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## Stormans and the Pharmacists: Where Have All the Conscientious Rx Gone?

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# *Stormans* and the Pharmacists: Where Have All the Conscientious Rx Gone?

Jason R. Mau\*

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## I. INTRODUCTION

The “right of conscience” is a term that is likely to elicit strong feelings in any context.<sup>1</sup> Use that same phrase with the word “pharmacist” and these strong feelings will most likely be heightened, because they involve issues of reproduction and First Amendment rights, both evoking passionate views.<sup>2</sup> Recently, the increasing amount of stories reporting pharmacists’ refusal to sell over-the-counter emergency

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1. “Right of conscience” as used in this Comment refers to rights asserted by health care professionals. The term “right of conscience” can also be found in settings not related to the medical field. *See, e.g.*, *State v. French*, 460 N.W.2d 2, 9 (Minn. 1990) (holding right of conscience of landlord outweighed tenant’s right to live with fiancé prior to marriage), Georgia Chudoba, Comment, *Conscience in America: The Slippery Slope of Mixing Morality With Medicine*, 36 SW. U. L. REV. 85, 91-95 (2007) (listing right of conscience in other professions).

2. For an example of how quickly the debate can become heated, compare posting of Roger Rabbit to <http://horsesass.org/?p=3763#comments> (Nov. 9, 2007, 12:37 PST), and posting of Tlazolteotl to <http://horsesass.org/?p=3763#comments> (Nov. 9, 2007, 1:12 PST), with posting of Piper Scott to <http://horsesass.org/?p=3763#comments> (Nov. 9, 2007, 12:52 PST) (name-calling, accusations of narrow-mindedness, and recriminations within first five comments). For an example of a more civil debate, compare posting of arvadaathiest to [http://atheists.org/blog/2005/10/18/pharmacist\\_refuses\\_prescription/comment-page-1#comments](http://atheists.org/blog/2005/10/18/pharmacist_refuses_prescription/comment-page-1#comments) (Oct. 18, 2005, 13:46 EST), with posting of dsilverman to [http://atheists.org/blog/2005/10/18/pharmacist\\_refuses\\_prescription/comment-page-1#comments](http://atheists.org/blog/2005/10/18/pharmacist_refuses_prescription/comment-page-1#comments) (Oct. 18, 2005, 13:54 EST) (considering circumstances that may affect debate).

contraceptives<sup>3</sup> has fueled the public debate<sup>4</sup> between those who believe in a right of conscience and those who believe in a right of access to contraceptives.<sup>5</sup> This public debate over emergency contraceptives and pharmacists' right of conscience has led many state legislatures to enact or amend previously existing legislation to outline each state's position on the subject.<sup>6</sup> Consequently, there is no lack of contemporary academic commentary in the legal community on the subject of pharmacists' rights to keep the debate running strong.<sup>7</sup>

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3. See NATIONAL WOMEN'S LAW CENTER, PHARMACY REFUSALS 101 (Feb. 2008), available at [http://www.nwlc.org/pdf/PharmacyRefusals101\(Feb08\).pdf](http://www.nwlc.org/pdf/PharmacyRefusals101(Feb08).pdf) (reporting pharmacist refusals in twenty-one states).

4. See Josh Fischman, *Plan B: To Shelf, or Not to Shelf*, U.S. NEWS & WORLD REPORT, Aug. 14, 2006, available at <http://health.usnews.com/usnews/health/articles/060806/14fda.htm> (stating "Plan B has become Topic A in health circles").

5. See 1 AM. JUR. 2D *Abortion and Birth Control* § 3 (stating general constitutional basis for the right to contraceptives is grounded in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married individuals to the use birth control); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right extended to unmarried individuals); *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977) (right extended to minors)).

6. For a current list of state laws and proposed legislation upholding or denying a pharmacist's right of refusal, or right of conscience, see National Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation*, Updated November 2007, available at <http://www.ncsl.org/programs/health/conscienceclauses.htm> [hereinafter *Laws and Legislation*] (last visited Oct. 2, 2008) ("Most of the debate revolves around a pharmacist dispensing emergency contraception."). See also Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services*, Dec. 1, 2008, at 1-2, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (last visited Dec. 27, 2008) (listing state policies allowing various health providers to refuse service); Guttmacher Institute, *State Policies in Brief: Emergency Contraception*, Dec. 1, 2008, at 1-2, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_EC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf) (last visited Dec. 27, 2008) (listing state policies pertaining specifically to emergency contraception); Adam Sonfield, *Provider Refusal and Access to Reproductive Health Services: Approaching a New Balance*, 11 GUTTMACHER POL'Y REV. 2, 4-6 (Spring 2008). The Guttmacher Institute, publisher of the *Guttmacher Policy Review*, "[a]dvanc[es] sexual and reproductive health worldwide through research, policy analysis and public education." See Guttmacher Institute Home Page, <http://www.guttmacher.org/> (last visited Dec. 27, 2008). The author will most often refer to the rights and legislation discussed in the Comment with the terms "right of conscience" and "conscience clause" instead of "right of refusal" and "refusal clause," but recognizes why "refusal" is often used. See Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 474 (2006) ("In this Article, the term 'refusal clause' is used because it more accurately reflects the action taken by the pharmacist, as well as the impact of that action on a patient trying to obtain access to a legal medication.").

7. The legal works in this area can be divided into three very general areas: (1) works advocating a pharmacist right of conscience, see, e.g., Brian P. Knestout, Comment, *An Essential Prescription: Why Pharmacist-Inclusive Conscience Clauses are Necessary*, 22 J. CONTEMP. HEALTH L. & POL'Y 349 (2006); Tony J. Kriesel, Note, *Pharmacists and The "Morning-After Pill": Creating Room for Conscience Behind the Counter*, 7 MINN. J. L. SCI. & TECH. 337 (2005); Nell O. Kromhout, Note, *Crushed at the Counter: Protection for a Pharmacist's Right of Conscience*, 6 AVE MARIA L. REV. 265 (2007); (2) works advocating an individual's right of access to contraception, see, e.g.,

The most recent proceedings fueling the current debate within the legal community are four court cases, *Menges v. Blagojevich*,<sup>8</sup> *Vandersand v. Wal-Mart Stores, Inc.*,<sup>9</sup> *Stormans, Inc. v. Selecky*,<sup>10</sup> and *Noesen v. State of Wisconsin Dep't of Regulation and Licensing, Pharmacy Examining Board*.<sup>11</sup> Further contributing to the debate is a recently published final regulation from the Department of Health and Human Resources.<sup>12</sup> When first proposed, the regulation<sup>13</sup> had many critics speculating that it was an effort to extend federal right of conscience protection created for health care workers refusing to perform abortions, to pharmacists refusing to fill contraceptive prescriptions.<sup>14</sup> This Comment will focus on the current debate and current state of protection for a pharmacist's right of conscience when dealing with emergency contraceptives. Initially, this Comment will provide a backdrop for the current debate, describing court findings in the recent cases. This Comment will also introduce the drafting of the proposed

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Charu A. Chandrasekhar, *Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006); Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779 (2007); Nancy K. Kubasek, Daniel C. Tagliarina, Corinne Staggs, *The Questionable Constitutionality of Conscientious Objection Clauses for Pharmacists*, 16 J. L. & POL'Y 225 (2007); Heather A. Weisser, Note, *Abolishing the Pharmacist's Veto: An Argument In Support of a Wrongful Conception Cause of Action Against Pharmacists Who Refuse to Provide Emergency Contraception*, 80 S. CAL. L. REV. 865 (2007); and (3) works looking for a compromise and recognizing the rights of all affected, see, e.g., Maria Teresa Weidner, Note, *Striking a Balance Between Faith and Freedom: Military Conscientious Objection as a Model for Pharmacist Refusal*, 11 J. GENDER RACE & JUST. 369 (2008); Matthew White, Comment, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights with the Rights of Patients and Institutions*, 2005 WIS. L. REV. 1611 (2005); Jessica D. Yoder, Note, *Pharmacists' Right of Conscience: Strategies for Showing Respect For Pharmacists' Beliefs While Maintaining Adequate Care for Patients*, 41 VAL. U. L. REV. 975 (2006).

8. 451 F. Supp. 2d 992 (C.D. Ill. 2006).

9. 525 F. Supp. 2d 1052 (C.D. Ill. 2007).

10. 524 F. Supp. 2d 1245 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008).

11. 751 N.W.2d 385 (Wis. Ct. App. 2008).

12. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008). See also Rob Stein, *Rule Shields Health Workers Who Withhold Care Based on Beliefs*, WASH. POST, Dec. 19, 2008, at A10; David Stout, *Medical 'Conscience Rule' is Issued*, N.Y. TIMES, Dec. 19, 2008, available at [http://www.nytimes.com/2008/12/19/washington/19rule.html?\\_r=1&em](http://www.nytimes.com/2008/12/19/washington/19rule.html?_r=1&em).

13. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (proposed Aug. 26, 2008).

14. See Robert Pear, *Abortion Proposal Sets Condition on Aid*, N.Y. TIMES, July 15, 2008, at A17 (quoting National Family Planning and Reproductive Health Association's reservations).

rule, and filing of the final rule, by the Department of Health and Human Resources. Next, this Comment will analyze the current situation, looking at the current positions of both those opposed to, and in support of, a pharmacist's right of conscience, and the protections afforded by the current proceedings. Included in the analysis will be an examination of the Department of Health and Human Resources' criticisms. Finally, the Comment will consider whether the recent regulation will provide any additional protection to the federal case law currently recognizing a pharmacist's right of conscience.

## II. BACKGROUND

### A. Court Cases Dealing with a Pharmacist's Right of Conscience

#### 1. *Stormans, Inc. v. Selecky*

On July 25, 2007, Storman's Stores, a pharmacy, and individual pharmacists Rhonda Mesler and Margo Thelen, filed a lawsuit against the Washington State Department of Health and the Washington Human Rights Commission.<sup>15</sup> The plaintiffs alleged that the regulations<sup>16</sup> adopted by the Washington State Board of Pharmacy on April 2, 2007, effective July 26, 2007, and enforceable under the Washington Law Against Discrimination<sup>17</sup> through the Washington Human Rights Commission, violated their free exercise, equal protection, and due process rights under the First and Fourteenth Amendments<sup>18</sup> because the regulations' enforcement interfered with the free exercise of their religion.<sup>19</sup>

The source of the plaintiffs' concern dated back some eighteen months to January 2006, when the Washington State Pharmacy Association (WSPA) presented findings it adopted from its July 2005 committee to the State Board of Pharmacy.<sup>20</sup> WSPA outlined specific "professionally unacceptable" behavior in its support for individuals obtaining legally prescribed treatment, while reasonably accommodating

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15. *Stormans*, 524 F. Supp. 2d at 1253-54.

16. WASH. ADMIN. CODE §§ 246-863-095, 246-869-010 (2008) (pertaining to a "Pharmacist's professional responsibilities and Pharmacies' Responsibilities").

17. WASH. REV. CODE §§ 49.60.010-.60.401 (2005).

18. U.S. CONST. amends. I, XIV.

19. *Stormans*, 524 F. Supp. 2d at 1248, 1251, 1255.

20. Washington State Department of Health Board of Pharmacy, Meeting Minutes 5-6 (Jan. 26, 2006), available at [http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/Jan26\\_06.pdf](http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/Jan26_06.pdf).

a pharmacist's conscience and recognizing a right of refusal.<sup>21</sup> As a result, the Board moved to explore the adoption of a rule to design standards of pharmaceutical practice allowing the Board to cite unacceptable actions.<sup>22</sup> At the next meeting the Board allowed the Northwest Women's Law Center and Planned Parenthood to present their strong disagreement with a pharmacist's conscience clause, and the Board also permitted audience comments.<sup>23</sup> On April 21, after two days of meetings, and amid accumulating public comments, the Board began drafting a new regulation.<sup>24</sup>

After reviewing two drafts, the Board of Pharmacy made changes and adopted a third draft rule on June 1, 2006.<sup>25</sup> The proposal allowed for a pharmacist to refuse to fill an emergency contraceptive prescription on moral grounds, while requiring the pharmacist to provide the patient alternative means to fill the prescription, which may include referring a patient to another pharmacy.<sup>26</sup> Response to the adoption was instantaneous.<sup>27</sup> The same day, Governor Christine Gregoire issued a

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21. *Id.* The national American Pharmacists Association supports a pharmacist's right of conscience, affirming the "right to choose not to fill a prescription based on moral or ethical values." Bob Reynolds, *AMA Rules on Pharmacist Conscience Clauses*, available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=8688> (last visited Feb. 5, 2009).

22. *Id.* at 6-7.

23. Washington State Department of Health Board of Pharmacy, Meeting Minutes 6-9 (Mar. 10, 2006), available at <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/03102006.pdf>. The presentations by the Northwest Women's Law Center and Planned Parenthood included information on professional standards of conduct, examples of pharmacist refusals, and national trends of states rejecting a pharmacist's right to refuse. *Id.* at 7-8. Individuals participating in audience comments included eighteen supporters and three opponents of a conscience clause. *Id.* at 8. Information presented during audience comment focused on current laws, current accessibility to pharmacists, availability of emergency contraceptives in Washington, and considerations of rights and accommodations. *Id.* at 8-9.

24. Washington State Department of Health Board of Pharmacy, Meeting Minutes 9 (Apr. 21, 2006), available at <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/04202006.pdf>. The Board received almost five thousand letters, phone calls, and emails on the subject. *Id.* See also Shannon Dininny, *Pharmacy Board Drafts Rule on Refusing Service*, SEATTLE TIMES, Apr. 22, 2006, at B2 (stating discussion included numerous issues and comments); Brad Shannon, *Contraception Focus of Dispute*, THE OLYMPIAN (Olympia, Wash.), Apr. 20, 2006, at 1B (reporting plans of additional meetings to take comments).

25. Washington State Department of Health Board of Pharmacy, Meeting Minutes 9 (June 1, 2006), available at <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/06012006.pdf>.

26. See Susan Phinney and Curt Woodward, *Board Says Drugstores Can Refuse Medication 'Morning After' Pill*, SEATTLE POST-INTELLIGENCER, June 2, 2006, at A1.

27. See Cara Solomon, *Pharmacists Should be Able to Deny Morning-After Pill, State Board Says; Patients Could be Sent Elsewhere—Public Hearing to be Held in August*, SEATTLE TIMES, June 2, 2006, at A1 ("Gov. Christine Gregoire immediately . . . object[ed].").

public statement and presented a letter to the Board stating her displeasure, as well as objections, concerning the third draft.<sup>28</sup> Governor Gregoire was most concerned with the vague outlines for pharmacists' responsibilities and the allowing of pharmacists to object to filling any prescription for any "personal, religious, or moral objection."<sup>29</sup> In addition to the direct response, Governor Gregoire also began to apply pressure on the Board, making clear the availability of political measures she was willing to use.<sup>30</sup> The pressure apparently worked; the Board, at the Pharmacy Board meeting on July 20, 2006, voted unanimously to delay submission of their draft proposal to the Office of the Code Reviser.<sup>31</sup> At the August 31, 2006 meeting, the Board moved to reconsider its rule proposal, allowing the governor's staff to present alternative rules to her,<sup>32</sup> and at the next meeting officially moved forward with the alternative rules in the rulemaking process.<sup>33</sup> Finally, on April 12, 2007, the Board adopted the new rules scheduled to take

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28. Office of Governor Chris Gregoire, Statement from Governor Gregoire on Pharmacy Board Rules (June 1, 2006), *available at* <http://www.governor.wa.gov/news/news-view.asp?pressRelease=291&newsType=1> [hereinafter Statement from Governor] ("I strongly oppose the draft pharmacist refusal rules recommended by the Washington State Board of Pharmacy today.").

29. Office of Governor Chris Gregoire, Governor Gregoire's Letter to the Washington State Board of Pharmacy (June 1, 2006), *available at* <http://www.governor.wa.gov/news/2006-06-01LetterToPharmacyBoard.pdf> ("I expect the Board to develop rules that provide clear guidance and protection to the public. It is my hope that the Board will ultimately develop rules that put patients first.").

30. The legal options available included passing legislation, removing the Board members, and submitting an alternative rule. See Brad Shannon, *Gregoire: Letting Pharmacists Refuse Prescriptions 'a Mistake,'* THE OLYMPIAN (Olympia, Wash.), June 6, 2006, at 1A ("If [the process is] not [done right], I will do what is necessary to correct it, Gregoire said bluntly, adding at one point that she did not want the board to think it was in a dictatorship."); see also Editorial, *Fire Pharmacy Board,* SEATTLE TIMES, June 9, 2006, at B6 (insisting that the governor "replace the entire" Board).

31. Washington State Department of Health Board of Pharmacy, Meeting Minutes 4 (July 20, 2006), *available at* <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/documents/07202006.pdf> (since the June 1, 2006 meeting, the Board had received over 2,250 contacts, with most opposed to the Board's draft).

32. Washington State Department of Health Board of Pharmacy, Meeting Minutes 8-9 (Aug. 31, 2006), *available at* <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/08312006.pdf>. See also Office of Governor Chris Gregoire, Governor Gregoire Proposes New Rule to Washington Pharmacy Board (Aug. 29, 2006), *available at* [http://www.governor.wa.gov/news/2006-08-28\\_pharm\\_board.pdf](http://www.governor.wa.gov/news/2006-08-28_pharm_board.pdf) [hereinafter Governor's Letter Proposal] ("I present this alternative rule as the most reasonable compromise. It clearly states that pharmacists have a duty to dispense lawfully prescribed drugs. . . . I strongly recommend that the Board of Pharmacy adopt this finely negotiated version.").

33. Washington State Department of Health Board of Pharmacy, Meeting Minutes 5-6 (Oct. 27, 2006), *available at* <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/documents/10272006.pdf>.



effect July 26, 2007, limiting the right of conscience to circumstances where another pharmacist was available to fill the prescription.<sup>34</sup>

Plaintiffs filed suit a day before the regulations would take effect.<sup>35</sup> Stormans, Inc., owner of Ralph's Thriftway and Bayview Thriftway supermarkets in Olympia, operate a pharmacy in Ralph's Thriftway.<sup>36</sup> As the subject of an ongoing boycott,<sup>37</sup> complaints filed with the Pharmacy Board,<sup>38</sup> as well as possible sanctions from the new

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34. Washington State Department of Health Board of Pharmacy, Meeting Minutes 1-3 (Apr. 12, 2007), available at <http://www.doh.wa.gov/hsqa/Professions/Pharmacy/Documents/04122007.pdf>. See also Sean Cockerham, *Pharmacies must fill Plan B*, *State Board Says*, THE NEWS TRIBUNE (Tacoma, Wash.), Apr. 13, 2007, at A1 (stating pharmacies will be unable to refuse prescriptions for birth control unless another druggist at pharmacy can fill without hassle to customer); Brad Shannon, *Board Says that Plan B is Must-Sell*, THE OLYMPIAN (Olympia, Wash.), Apr. 13, 2007, at 1A (reporting regulation will not allow pharmacists to morally object to emergency contraception prescription if no other pharmacist on duty); Carol M. Ostrom, *Pharmacies Must Fill All Drug Orders, Including Plan B Pill*, *States Rules*, SEATTLE TIMES, Apr. 13, 2007, at B1 (reporting pharmacist can refuse to fill prescription as long as another pharmacist present can fill the prescription).

35. See Curt Woodward, *Plan B Rule Sparks Lawsuit; Pharmacists Sue—Morning-After Pill Violates Their Moral Beliefs, They Say*, SEATTLE TIMES, July 27, 2007, at B4 (stating rule took effect Thursday, lawsuit filed Wednesday); Michael Johnsen, *Plan B*, DRUG STORE NEWS, Dec. 10, 2007, available at 2007 WLNR 25015108 ("suit was filed . . . one day before the state enacted its regulation").

36. See Ralph's Thriftway—Pharmacy, <http://www.ralphsthriftway.com/tour/pharmacy.html> (last visited Oct. 29, 2008); Stormans, Inc. Home Page, <http://www.stormans.com> (last visited Oct. 29, 2008).

37. See Brad Shannon, *Boycott Brews Over Grocer's Plan B Stand*, THE OLYMPIAN (Olympia, Wash.), June 21, 2006, at 1A [hereinafter Shannon, *Boycott Brews*] (stating activists "hope to launch a monthlong boycott"). Months later, the boycott was still in place. See Brad Shannon, *Sides Vow to Continue Thriftway Plan B Standoff*, THE OLYMPIAN (Olympia, Wash.), Dec. 11, 2006, at 1A [hereinafter Shannon, *Sides Vow*] ("Neither side is giving an inch in the ongoing boycott. . ."). Efforts were made to extend the boycott year round. See Adam Wilson, *Williams Tries to Energize Boycott*, THE OLYMPIAN (Olympia, Wash.), Aug. 30, 2007, at 1B (rallying support, State Representative Williams tries to make boycott a yearlong effort). Even the governor got involved in the boycott. See Gregoire Staff Shuns Grocer Who Balked at Contraceptive, THE COLUMBIAN (Vancouver, Wash.), Dec. 8, 2006, at C6 (governor's mansion's cooking staff cancelled credit account near beginning of boycott); Brad Shannon, *Mansion Drops Bayview Account*, THE OLYMPIAN (Olympia, Wash.), Dec. 7, 2006, at 1A (Stormans' staff was told the mansion's account was cancelled because of the Plan B issue).

38. See *Plan B Pill's Unavailability Angers Women*, THE COLUMBIAN (Vancouver, Wash.), Aug. 2, 2006, at C2 [hereinafter *Unavailability Angers Women*] (alleging complaints represent seventeen prescriptions went unfilled in capital area during two month period); Brad Shannon, *Pharmacy Board Ends Initial Ralph's Probe; Battle Over Whether to Sell Plan B Contraceptive to Continue*, THE OLYMPIAN (Olympia, Wash.), Sept. 8, 2007, at 1A [hereinafter Shannon, *Battle to Continue*] (reporting once regulations became official, "at least" ten new complaints brought after original complaints already filed); Brad Shannon, *Plan B Legal Action Possible; Board Sends Thriftway Case to Legal Team*, THE OLYMPIAN (Olympia, Wash.), June 10, 2007, at 1C [hereinafter Shannon, *Board Sends Case*] (reporting leader of boycott organized filing of complaints);

regulations, Stormans, Inc., felt they had no choice but to file suit<sup>39</sup> to protect their rights.<sup>40</sup> Margo Thelen, a licensed pharmacist for thirty-five years,<sup>41</sup> was one of two pharmacists who joined Stormans, Inc. in the lawsuit.<sup>42</sup>

Ms. Thelen notified her previous employer that her religious beliefs prevented her from dispensing emergency contraceptives, and she was allowed to refer patients to another pharmacy when Plan B was

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Brad Shannon, *Women Contest Plan B Stances*, THE OLYMPIAN (Olympia, Wash.), Aug. 1, 2006, at 1A [hereinafter Shannon, *Women Contest*] (filing of complaints against pharmacies that do not stock Plan B contraceptive).

39. See Kevin Stormans, Guest Columnist, *Belief Against Taking Human Life is Firm*, THE SEATTLE-POST INTELLIGENCER, Nov. 20, 2007, at B7 (“No one should be forced to choose between their business and livelihoods and their deeply held belief against taking human life.”) (written in response to alleged misrepresentations by Olympia resident, and State Representative, Brendan Williams, Guest Columnist, *Plan B Decision is all Wrong*, THE SEATTLE-POST INTELLIGENCER, Nov. 13, 2007, at B7.). According to Mr. Stormans, co-owner of Stormans, Inc., phone calls starting in May 2006 asked if the Ralph’s Thriftway Pharmacy carried Plan B medication. *Id.* See also, Adele Nicholas, *Pharmacies Face Off with Washington Over Drug Law*, INSIDE COUNSEL, July 2008, at 69 (calling the first call “a fateful phone call”). Since customers had never requested the emergency contraceptive before, Ralph’s did not stock it. Stormans, *supra* at B7. Ralph’s began to get anonymous calls demanding Plan B be stocked at the pharmacy. *Id.* Subsequently, Mr. Stormans began to research Plan B and was alarmed by the manufacturer’s warning that it may destroy a fertilized human egg. *Id.* Consequently, Stormans, Inc. decided not to stock the drug because Mr. Stormans could not, in “good conscience,” supply a drug to the public that could potentially “destroy human life.” *Id.*

40. See Shannon, *Boycott Brews*, *supra* note 35, at 1A (quoting Mr. Stormans’ basic statement that he thinks “people have the right to choose when they believe life begins. There are questions about this drug on this issue.”); Brad Shannon, *Stormans Ponders Legal Action Over Plan B Rule*, THE OLYMPIAN (Olympia, Wash.), July 25, 2007, available at 2007 WLNR 14200702 [hereinafter Shannon, *Stormans Ponders*] (“We believe for moral and religious reasons, life begins when an egg is fertilized.”). Stormans’ moral stand on Plan B led to the boycott of the Ralph’s and Bayview Thriftway supermarkets. See Shannon, *Boycott Brews*, *supra* note 37, at 1A. Stormans’ policy was to refer the customer to another pharmacy in the area. See Nicholas, *supra* note 39, at 69 (referring customers to one of thirty-three pharmacies within five-mile radius); Stormans, *supra* note 39, at B7 (referring to one of thirty-two area drugstores); Shannon *Stormans Ponders*, *supra* (refuting claim that Ralph’s failure to stock keeps public from accessing the drug as there are at least a “few dozen other places” in Olympia area where it can be obtained). Prior to the calls and the boycott, Stormans said there was no demand for the medication. See *id.* (“The demand began when the people who wanted to make this an issue started to make this an issue.”). Although the new regulations appeared to apply to all medications, Stormans, Inc. believed they were the target of the rules, forcing the distribution of Plan B. Nicholas, *supra* note 39, at 69.

41. See Declaration of Margo Thelen at 1, *Stormans v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (No. C07-5374), available at 2007 WL 5043861.

42. See Nicholas, *supra* note 39, at 69 (Stormans joined “by two pharmacists whose jobs were threatened by the regulation”). See also Woodward, *supra* note 35, at B4; Brad Shannon, *Pharmacy Fight Goes to Court; Ralph’s Thriftway Co-Owner Among Plaintiffs*, THE OLYMPIAN (Olympia, Wash.), July 27, 2007, at 1B (Margo Thelen also named as plaintiff).

requested.<sup>43</sup> After the new regulations were passed, Ms. Thelen made contact with the Board of Pharmacy to receive a full understanding of the requirements.<sup>44</sup> She was notified that she would no longer be able to refer customers to another pharmacy; thus Ms. Thelen and her employer realized that their arrangement for referral would no longer work.<sup>45</sup> Ms. Thelen was able to find another pharmacist position at a hospital with a long commute, but her new employer was not able to guarantee a continuous accommodation of her religious convictions.<sup>46</sup> She feared that she could lose a job again in the future because of her religious objection if any supervisorial or circumstantial changes were to occur.<sup>47</sup> Ms. Thelen also believed that the Washington Human Rights Commission's position on pharmacists declining to dispense Plan B violated Washington law,<sup>48</sup> even though the Board of Pharmacy was not yet willing to take a position on the Commission's argument.<sup>49</sup> Accordingly, Ms. Thelen became one of the two individual pharmacists to join Stormans, Inc., in the lawsuit.

The plaintiffs filed a Motion for Preliminary Injunction to "enjoin the enforcement" of the regulations, which the court granted because the evidence for the free exercise issue alone suggested a "likelihood of success on the merits."<sup>50</sup> District Judge Leighton's opinion focused on the First Amendment claim<sup>51</sup> of the individual pharmacists.<sup>52</sup> The opinion reflects a position that the regulations were never really neutral, and they therefore meet the standard of review for injunctive relief.<sup>53</sup> Overall, the court's view was that "the regulations appear designed to impose a Hobson's choice for the majority of pharmacists who object to

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43. Declaration of Margo Thelen, *supra* note 41, at 2 (declaring prescriptions for Plan B were rare, only four in two and one half years).

44. *Id.* at 3, 5-8.

45. *Id.* at 3, 6-7.

46. *Id.* at 3-4.

47. *Id.* at 4.

48. Declaration of Margo Thelen, *supra* note 41, at 2.

49. *Id.* at 4-5.

50. *Stormans*, 524 F. Supp. 2d at 1248, 1266.

51. *Id.* at 1255, 1266 ("A party seeking preliminary injunctive relief... can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.") (citing *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)).

52. *Id.* at 1266 (leaving unresolved the question of whether a right of free exercise of religion applies to a corporate plaintiff).

53. *Id.* at 1260 ("[T]hese regulations targeted the religious practices of some citizens and are therefore not neutral."). Furthermore, "the regulations appear to target religious practice in a way forbidden by the Constitution. The regulations are neither neutral as to religion nor are they generally applicable." *Id.* at 1263. Finally, under the court's strict scrutiny analysis, "the evidence suggests that the burden on the religious practices of plaintiffs is intentional not incidental, and substantial not minimal." *Id.* at 1265.

Plan B.”<sup>54</sup> The pharmacist can either fill the prescription that the pharmacist believes ends a life or the pharmacist can be forced to practice his or her career outside of Washington.<sup>55</sup>

On appeal, the defendant-intervenors from the original case moved for a stay of the injunction pending appeal.<sup>56</sup> The defendant-intervenors were unable to “controvert [the] findings” of the district court, citing only evidence that was already before the lower court at the time of its ruling.<sup>57</sup> The motion for the stay was denied, but the lone dissenter in the appeal opined that the defendants would eventually succeed on the merits.<sup>58</sup> Until the case is heard on the merits, the injunction remains in effect.

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54. 524 F. Supp. 2d at 1259. “Hobson’s choice” is an expression for a free choice where only one option is offered, and essentially is offered as ‘take that, or none.’ THE AMERICAN HERITAGE COLLEGE DICTIONARY 658 (4th ed. 2004). The phrase originates from a Sixteenth century stable owner in Cambridge who offered customers either the horse in the stall nearest the door, or none at all. *Id.*

55. *Id.*

56. *Stormans Inc. v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008). For information on the individuals that intervened in the original action, see *Stormans*, 524 F. Supp. 2d at 1254-55 (intervening on behalf of defendants because of a concern “about access to lawful medications in Washington.”).

57. 526 F.3d at 409. Seven individuals were allowed to intervene in the District Court case and claimed, on different personal levels, concern with the denial or harassment faced by patients seeking to fill prescriptions. See *Stormans*, 524 F. Supp. 2d at 1249, 1254-55. Two of the intervenors serve on the Governor’s Advisory Council on HIV/AIDS as citizen representatives. See Washington State Department of Health, Governor’s Advisory Council on HIV/AIDS, Council Members, Apr. 2007, [http://www.doh.wa.gov/cfh/HIV\\_AIDS/GACHA/gachacouncil.htm](http://www.doh.wa.gov/cfh/HIV_AIDS/GACHA/gachacouncil.htm). Neither of the two HIV-community representatives had been denied access to medication but expressed concern that future patients would be denied access to anti-retroviral drugs. See *Stormans*, 524 F. Supp. 2d at 1254; Carol M. Ostrom, *Board Gets an Earful on Plan B Proposal; Turbulent Hearing—Speakers Square Off on Pharmacist Rights, Contraception Access*, SEATTLE TIMES, Mar. 30, 2006, at B3. Three of the intervenors had used Plan B, two of them recounted their difficulties filling the prescriptions, while the third chose to obtain Plan B from Planned Parenthood the two times she needed it, once after a sexual assault. *Stormans*, 524 F. Supp. 2d at 1254-55. The two remaining intervenors had never used Plan B, but one participated in a Planned Parenthood program identifying pharmacists’ willingness to stock Plan B, and the other wished to help ensure that all women in Washington could gain access to Plan B. *Id.* at 1255.

58. *Stormans Inc.*, 526 F.3d at 412 (Tashima, J., dissenting). The dissenting opinion even went so far as to say that the majority opinion essentially believed the defendants would win on the merits, stating that the majority “virtually concedes” that the regulations do not violate the free exercise of religion. *Id.* Apparently the dissent was reading meaning into the majority’s statement “[e]ven assuming the district court erred in concluding [the] regulations violate the Free Exercise Clause.” *Id.* at 408.

## 2. *Menges v. Blagojevich*

A similar conscience clause case, cited in the *Stormans* decision,<sup>59</sup> is *Menges v. Blagojevich*.<sup>60</sup> Like *Stormans*, the main issue in *Menges* was whether a pharmacist could refuse to fill a prescription for emergency contraception on moral or religious grounds.<sup>61</sup> The issue was presented when a state agency introduced a regulation referring to the duty of a pharmacist to fill a prescription.<sup>62</sup> Immediately after the regulation became effective, the governor notified physicians and pharmacists statewide of the state's intention to prosecute pharmacists refusing to fill prescriptions.<sup>63</sup> Within a month complaints were filed against Illinois pharmacies under investigation for refusing to fill prescriptions for emergency contraceptives.<sup>64</sup> Two of the complaints were against Walgreens, which, in response to one of the complaints, fired a pharmacist and required its remaining pharmacists to sign a new policy requiring the filling of Plan B prescriptions.<sup>65</sup> Four Walgreens pharmacists refused to sign the agreement and were placed on unpaid

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59. *Stormans*, 524 F. Supp. 2d at 1265-66 ("arising out of the same national controversy").

60. 451 F. Supp. 2d 992 (C.D. Ill. 2006).

61. *Id.* at 995.

62. See ILL. ADMIN. CODE tit. 68 § 1330.91 (2008), available at <http://www.ilga.gov/commission/jcar/admincode/068/068013300000910R.html>. More specifically, the regulation referred to prescriptions for contraceptives. See *id.* The Illinois Department of Financial and Professional Regulation (IDFPR) introduced the rule as an Emergency Amendment to the Code on April 1, 2005; the rule became permanent on August 25, 2005. See *Menges*, 451 F. Supp. 2d at 996; *Department of Financial and Professional Regulation; Notice of Emergency Amendment*, REGALERT, Apr. 15, 2005, available at 2005 WLNR 6198171; Office of the Governor, *Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives; Files Emergency Rule to Prevent Pharmacies from Turning Women Away. Announces Disciplinary Action Against Chicago Retail Pharmacy for Refusing to Fill Prescriptions for Contraceptives New Toll-Free Phone Number Enables Women to Report Non-Compliant Pharmacies to State Regulators*, ILLINOIS GOVERNMENT NEWS NETWORK, Apr. 1, 2005, [hereinafter *Blagojevich Takes Emergency Action*] available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805>; Office of the Governor, *Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent*, ILLINOIS GOVERNMENT NEWS NETWORK, Apr. 18, 2005, available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862>.

63. See *Menges*, 451 F. Supp. 2d at 997 ("letter asked physicians to report any pharmacists who refused to fill a prescription for Emergency Contraceptives").

64. See Mary Massingale, *Governor, Agency Sued Over Contraceptive Rule*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Dec. 21, 2005, at 11 (filing of three complaints by IDFPR during September, fining one pharmacy).

65. See Massingale, *supra* note 64, at 11; Leah Thorsen and Adam Jhadav, *Druggists Suspended in Debate Over Pill Four Metro East Pharmacists are Accused of Refusing to Provide Contraceptives*, ST. LOUIS POST-DISPATCH, Nov. 30, 2005, at A1.

leave.<sup>66</sup> The fired and suspended Walgreens pharmacists, along with two other Illinois pharmacists claiming that the rule imposed a substantial burden on them, filed suit in federal court against the state regulators and the governor.<sup>67</sup> The plaintiffs alleged violations of the Free Exercise Clause<sup>68</sup> and Title VII of the Civil Rights Act.<sup>69</sup> Upon the filing of motions to dismiss by the defendants, and after viewing the evidence in a light most favorable to the plaintiffs, the court ruled that the plaintiffs had stated claims upon which relief could be granted and the defendants were directed to file answers.<sup>70</sup>

3. *Vandersand v. Wal-Mart Stores, Inc. and Noesen v. State of Wisconsin Dep't of Regulation and Licensing, Pharmacy Examining Board*

Two other cases fueling the debate on pharmacist's right of conscience are *Vandersand v. Wal-Mart Stores, Inc.*,<sup>71</sup> and *Noesen v. Wisconsin Dep't of Regulation and Licensing, Pharmacy Examining Board*.<sup>72</sup> In *Vandersand*, the Illinois rule requiring contraceptive prescriptions to be filled was again the catalyst that led to a pharmacist facing unemployment.<sup>73</sup> Ethan Vandersand, a pharmacist at an Illinois Wal-Mart store, allegedly turned away a customer with a prescription for emergency contraception, and was fired when a complaint was filed with

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66. See Aliana Ramos, *Lawsuit is Filed Over Dispensing Plan B Pill; Blagojevich Rule is at Heart of Debate*, BELLEVILLE NEWS DEMOCRAT (Ill.), Jan. 28, 2006, at A1; Thorsen and Jhadav, *supra* note 65, at A1; *Anderson Cooper 360 Degrees: Republicans Release Scathing Ad Attacking Democrats' Iraq War Position; Investigating the Crash of Flight 1248; Deadly Deer* (CNN television broadcast Dec. 9, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0512/09/acd.01.html>) (interviewing pharmacists Menges and Quayle).

67. See Massingale, *supra* note 64, at 11. Walgreens filed a third-party complaint in the case. See *Menges*, 451 F. Supp. 2d at 995, 999 (alleging rule conflicted with Title VII and that its referral policy complied with the rule and Title VII).

68. U.S. CONST. amend. I.

69. 42 U.S.C.A. §§ 2000e-2, 2000e-7 (West 2006). See *Menges*, 451 F. Supp. 2d at 995; E.A. Torriero and Courtney Flynn, *No Middle Ground for Pharmacist; John Menges Refused to Abide by a New State Rule That He Fill Prescriptions for the 'Morning-After' Pill. Now He's Out of a Job*, CHICAGO TRIBUNE, Mar. 6, 2006, at 1.

70. *Menges*, 492 F. Supp. 2d at 1002-05. Under plaintiff's allegations, the rule conflicted with Title VII because it forced employers to religiously discriminate against the pharmacists' beliefs. *Id.* at 1002-03. Allegations also suggested that the rule forced plaintiffs to compromise their religious beliefs or leave the profession. *Id.* at 1003.

71. 525 F. Supp. 2d 1052 (C.D. Ill. 2007).

72. 751 N.W.2d 385 (Wis. Ct. App. 2008).

73. See Dean Olsen, *'Plan B' Prescription Allegedly Rejected; Complaint to State Names Pharmacist in Beardstown*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Feb. 3, 2006, at 1 (reporting filed complaint with IDFP, which had already begun steps to discipline other pharmacists under the governor's rule).

the Illinois Department of Financial and Professional Regulation.<sup>74</sup> The pharmacist filed suit against Wal-Mart,<sup>75</sup> claiming protection under Title VII and the Illinois Health Care Right of Conscience Act.<sup>76</sup> The case still remains in federal court after Wal-Mart's motion to dismiss was denied.<sup>77</sup>

Similarly, in *Noesen*, a pharmacist was disciplined by the Wisconsin Pharmacy Examining Board for refusing to fill or transfer a prescription for contraceptives.<sup>78</sup> Noesen challenged the disciplinary proceedings, but in this instance, Noesen was unable to meet the state's compelling state interest and least restrictive alternative test and therefore the court upheld the Pharmacy Examining Board's decisions to reprimand him.<sup>79</sup>

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74. See Dean Olsen, *Federal Judge Allows Pharmacist's Suit; Faced Discipline for Refusing to Fill Plan B Prescription*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Aug. 3, 2007, at 1 [hereinafter Olsen, *Federal Judge Allows*] (put on unpaid leave after refusing to fill prescription for emergency contraceptive); Olsen, *supra* note 73, at 1 (subjecting Wal-Mart pharmacists that do not follow the rule to discipline, including termination).

75. See *Vandersand*, 525 F. Supp. 2d at 1052; Olsen, *Federal Judge Allows*, *supra* note 74, at 1.

76. 745 ILL. COMP. STAT. ANN. 70/1-14 (West 2008) ("unlawful for any person . . . to discriminate against any person in any manner . . . because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience").

77. See *Vandersand*, 525 F. Supp. 2d at 1057 ("The [Right of Conscience Act] prohibits discrimination against any person for refusing to provide health care service because of his conscience. . . . Vandersand alleges that he refused to provide medication because of his conscience. . . . Vandersand states a claim."); Olsen, *Federal Judge Allows*, *supra* note 74, at 1 ("continues in federal court").

78. See *Noesen*, 751 N.W.2d at 389-90; Anita Weier, *Patient, Pharmacist Collide; Birth Control Pill Conflict Shows Dilemma*, CAPITAL TIMES (Madison, Wis.), Mar. 16, 2004, at 1A. The pharmacist Noesen objected to dealing with contraception in general, not just emergency contraceptives. See *Noesen*, 751 N.W.2d at 388. *Noesen* is included to show that some pharmacists are more radical in claiming a right to conscience than others. In no way does the Comment attempt to argue that a right of conscience should trump all other considerations; *Noesen* appears to be the best example for a consideration of limits to a pharmacist's right of conscience.

79. *Noesen*, 751 N.W.2d at 392-94 (citing *State v. Miller*, 549 N.W.2d 235, 239-40 (Wis. 1996)). Noesen was able to show he had a sincerely held religious belief, the first prong of the test, but did not meet the next prong of the test: that his beliefs were burdened by application of the state law at issue. *Id.* See also WIS. ADMIN. CODE PhAR § 10.03(2) (2008). At a later job placement, Noesen ran into trouble again, getting fired when he refused to compromise with the employer's attempts to accommodate his convictions. See *Noesen v. Med. Staffing Network, Inc.*, No. 06-C-071-S, 2006 U.S. Dist. LEXIS 36918, at \*1 (W.D. Wis. June 1, 2006); Michael T. Burr, *Wal-Mart Beats Druggist's Discrimination Claim*, INSIDE COUNSEL, July 2007, at 78.

*B. The Department of Health and Human Resources Proposed Rule on General Right of Conscience*

A recently drafted Department of Health and Human Resources (HHS) proposed regulation and final rule rekindled the pharmacist right of conscience debate.<sup>80</sup> On its face, the rule appears to pertain only to right of conscience in the abortion context, and it has many observers wondering if this protection for health care employees will be extended to pharmacists dealing with emergency contraceptives.<sup>81</sup> The controversy was sparked when an early copy of the proposal, obtained by the *New York Times*, included a definition of abortion.<sup>82</sup> The draft definition sought to encompass reasonable understandings within the scientific and medical communities on pregnancy and abortion<sup>83</sup> in an effort to effectively implement the proposed rule's enforcement of current federal laws.<sup>84</sup> The draft defined abortion as "any of the various procedures—including the prescription and administration of any drug or the performance of any procedure or any other action—that results in the termination of the life of a human being in utero between conception and natural birth, whether before or after implantation."<sup>85</sup> Eventually, the definition was removed from the final proposal, filed August 26, 2008,<sup>86</sup> yet many critics believed the rule still allowed too broad of a conscience protection.<sup>87</sup>

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80. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (proposed Aug. 26, 2008); Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008).

81. See Pear, *supra* note 14, at A17 (quoting those that fear the proposal could cover birth control).

82. See Pear, *supra* note 14, at A17; Office of the Secretary of the Department of Health and Human Services, *Draft Memo on Proposed Rule*, 45 C.F.R. Part \_\_, available at <http://www.rhrealitycheck.org/emailphotos/pdf/HHS-45-CFR.pdf> [hereinafter *Draft Memo*] (last visited on Nov. 15, 2008).

83. *Draft Memo*, *supra* note 82, at 17.

84. See Church Amendments, 42 U.S.C.A. § 300a-7 (West 2006); Public Health Service Act § 245, 42 U.S.C.A. § 238n (West 2006); and Weldon Amendment, 121 Stat. 1844, 2209 (2007).

85. *Draft Memo*, *supra* note 82, at 17.

86. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (proposed Aug. 26, 2008). See also *All Things Considered: Abortion Rule Would Impede Birth Control* (NPR radio broadcast Sep. 26, 2008) (HHS Secretary deliberately choosing not to redefine anything differently.).

87. See *All Things Considered: Abortion Rule Would Impede Birth Control*, *supra* note 86 (reporting many groups worried regulation would override state laws offering emergency contraceptives to sexual assault victims).



### III. ANALYSIS

#### A. *Emergency Contraceptive: Effects of the Specific Medication*

A main point often raised by those opposed to a pharmacist's right of conscience is the notion that pharmacists, armed with an unchecked conscience, will turn away more than just prescriptions for emergency contraceptives. This argument was part of Governor Gregoire's rule in Washington,<sup>88</sup> and it was part of the defendant's response in the *Stormans* case.<sup>89</sup> The same type of argument comes up in legal<sup>90</sup> and medical<sup>91</sup> commentary, and even appeared in the response to the HHS

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88. See David Postman, *Pharmacy board can be ousted; On Politics*, SEATTLE TIMES, June 4, 2006, at B3 (referencing Governor's statement that the rule could apply to a person asking for "prescription having to do with AIDS" and a pharmacist refusing to fill a prescription based on an assumption that the consumer is homosexual); Governor's Letter Proposal, *supra* note 32 (stating pharmacy's duty as filling all legal prescriptions).

89. *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1254, 1258 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008) (defendants' argument that regulations were aimed at all prescriptions; intervenors specifically argue that pharmacists may turn away HIV-positive patients in the future).

90. See Harrington, *supra* note 7, at 800 ("a pharmacist may decline to refill a prescription for an AIDS drug because the person practices an 'immoral' life style"); Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 745-46 (2007) ("Moreover, protecting a right to refuse that encompasses all medications may lead to questionable behavior. A pharmacist may deny medication simply because he believes that its use somehow reflects an unethical lifestyle, such as HIV drugs for a homosexual man; antibiotics for a woman with a postabortion infection or a gun user with an infection from a gun wound; or Viagra for an unmarried man."); Katherine A. James, Note, *Conflicts Of Conscience*, 45 WASHBURN L.J. 415, 434-35 (2006) ("... concern that conscience clauses for pharmacists will lead to pharmacists refusing to fill prescriptions outside the area of contraception. For example, pharmacists who believe AIDS is a punishment from God may not fill a patient's prescription for AIDS medication."); Minh N. Nguyen, Comment, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves From Them?*, 8 SCHOLAR 251, 271 (2006) ("A pharmacist may refuse to give the AIDS patient his medication because the pharmacist feels that AIDS is God's way of punishing homosexuality. Refusal clauses could lead to a chain reaction of pharmacists and healthcare providers refusing to provide services, any services, to anyone for any reason.") *But see Stormans*, 524 F. Supp. 2d 1245, 1261 ("No one has been identified as having been denied access to HIV medicines because a pharmacist refused to dispense them.").

91. See Julie Cantor and Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 351, available at <http://content.nejm.org/cgi/content/full/351/19/2008?ijkey=DYRaziGhdKYrY&keytype=ref&siteid=nejm> (2004) ("If pharmacists can reject prescriptions that conflict with their morals, someone who believes that HIV-positive people must have engaged in immoral behavior could refuse to fill those prescriptions. Similarly, a pharmacist who does not condone extramarital sex might refuse to fill a sildenafil prescription for an unmarried man.").

proposed rule.<sup>92</sup> This attempt to take the focus off of the medication at issue in the ongoing debate, and instead to paint a picture of an expanding class of victims at the hands of the pharmacists, is presently unfounded. The debate has always centered on contraceptives, mostly emergency contraceptives, and appears that it will continue to focus on contraceptives, unless another debatably life-threatening medication is made available to the general public.

1. Washington Rulemaking Process: Directed at Pharmacists Refusing to Fill Prescriptions for Emergency Contraception

From that “fateful call”<sup>93</sup> to the Stormans pharmacy and onward, the public debate in Washington over a pharmacist’s right of conscience continues to concentrate on Plan B medication.<sup>94</sup> Although the final rules adopted by the Washington Board of Pharmacy appeared wide-reaching, the timing and the circumstances suggest a more narrow focus. The Board first considered the issue after it began receiving complaints of unfilled prescriptions for emergency contraception.<sup>95</sup> Throughout the comment-gathering stage of the rulemaking process, the Board minutes reflect concern for pharmacists refusing to fill prescriptions.<sup>96</sup> During the first open meeting on the subject of a conscience clause, the Board started with a comment on Washington’s leadership in prescribing and dispensing emergency contraception, as well as providing the first training program for emergency contraception.<sup>97</sup> During Planned Parenthood’s and Northwest Women’s Law Center’s presentations, they stated that the prescriptions being refused by pharmacists were the prescriptions for birth control.<sup>98</sup> They also shared their most compelling fear in light of the medicine’s decreasing effectiveness over time: women in small towns attempting to fill prescriptions for emergency contraception, being turned away and forced to travel to other pharmacies.<sup>99</sup> Of all the individual comments recorded in the minutes

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92. See *All Things Considered: Abortion Rule Would Impede Birth Control*, *supra* note 86 (reporting that “any potentially controversial medical technique or drug” could be at issue).

93. See Nicholas, *supra* note 39, at 69.

94. See Shannon, *supra* note 24, at 1B.

95. See *Stormans*, 524 F. Supp. 2d at 1250.

96. See Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* notes 20-25, 31-34.

97. See Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* note 23, at 6.

98. *Id.* at 7-8.

99. *Id.* at 8. For descriptions of how emergency contraceptive works, see Jennifer Spreng, *Pharmacists and the “Duty” to Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215, 222-29 (2008); Bradley L. Davis, Comment, *Compelled Expression of*

following the presentations, half specifically referred to the contraceptive issue.<sup>100</sup> The timing of the rulemaking and the circumstances surrounding the rulemaking procedure suggests a focus on emergency contraception.

## 2. Participants in the Washington Rulemaking Process: Not Committed to a Reasonable Compromise

In addition to the rulemaking circumstances, a look at the groups specifically invited to participate suggest the goal was to provide further protection for the women seeking emergency contraception. The only groups that were allowed to make a formal presentation to the Pharmacy Board after the process was opened were Planned Parenthood and Northwest Women's Law Center.<sup>101</sup> One of Planned Parenthood's listed issues of concern is access to emergency contraception, suggesting that Planned Parenthood sees itself as leading the fight to ensure that all women have access to contraceptives.<sup>102</sup> Another one of Planned Parenthood's listed issues is "Pharmacy Refusals" which lists only contraceptives as the medicine some pharmacies refuse to dispense or stock.<sup>103</sup> Similarly, Northwest Women's Law Center lists among its goals and women's fundamental rights, the achievement of "reproductive justice" and "rights and access to reproductive health care."<sup>104</sup> Although Northwest Women's Law Center recognizes that pharmacists may refuse other prescriptions, neither appears to be concerned with any medication besides contraception: not erectile dysfunction medication, specialized HIV medication, anti-depressants, or antibiotics.<sup>105</sup> Additionally, when

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*the Religiously Forbidden: Pharmacists, "Duty to Fill" Statutes, and the Hybrid Rights Exception*, 29 U. HAW. L. REV. 97, 101-03 (2006).

100. Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* note 23, at 8-9.

101. *Id.* at 6-8.

102. See Planned Parenthood, Issues and Action: Access to Emergency Contraception, <http://www.plannedparenthood.org/issues-action/birth-control/emergency-contraception-morning-after-pill-21020.htm> (last visited Nov. 16, 2008).

103. See Planned Parenthood, Issues and Action: Pharmacy Refusals, <http://www.plannedparenthood.org/issues-action/birth-control/pharmacy-refusals-21016.htm> (last visited Nov. 16, 2008).

104. See Northwest Women's Law Center, Women's Bill of Rights, <http://www.nwwlc.org/news/WomensBillOfRights.htm#One> (last visited Nov. 16, 2008). See also Northwest Women's Law Center, Health & Reproductive Freedom: Pharmacy Refusals, <http://www.nwwlc.org/difference/PharmacyRefusals.htm> (last visited Nov. 16, 2008) [hereinafter Pharmacy Refusals] (women turned away with prescriptions for emergency contraception); but see *id.* (alleging patient refusals for anti-depressants and antibiotics).

105. See generally Pharmacy Refusals, *supra* note 104 (alleging refusals for anti-depressants and antibiotics). See also intervenors concerns in *Stormans* case, including

the Governor presented her alternative rule, citing “hours of negotiation to delicately balance our respect for patients, pharmacists, and pharmacies,” listed among those interested in a “most reasonable compromise,” besides the Governor herself,<sup>106</sup> were Planned Parenthood and Northwest Women’s Law Center.<sup>107</sup> Therefore, the stated balance and broad language of the alleged compromise for the Washington regulations appeared to be focused on the narrow issue of emergency contraception.

### 3. Media Coverage in the Washington Rulemaking Process: Focusing on Emergency Contraceptives

Newspaper coverage during the rulemaking process highlighted the main issue with almost every headline referencing the rule’s focus on emergency contraception. When the rulemaking procedure began, the press was proclaiming titles such as *Contraception Focus of Dispute*,<sup>108</sup> as well as *Board Says Drugstores Can Refuse Medication ‘Morning After’ Pill*,<sup>109</sup> and *Pharmacists Should be Able to Deny Morning-After Pill, State Board Says; Patients Could be Sent Elsewhere—Public Hearing to be Held in August*.<sup>110</sup> Even after the Governor submitted her alternative rule, which she proclaimed would apply generally to all prescriptions and patients,<sup>111</sup> the press pointed out the main issue in headlines reading *Pharmacies must fill Plan B, State Board Says*,<sup>112</sup> in addition to *Board Says that Plan B is Must-Sell*,<sup>113</sup> and *Pharmacies Must*

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concern that HIV-positive patients could be denied HIV therapies. *Stormans*, 524 F. Supp. 2d at 1254, 1258, *stay denied*, 526 F.3d 406 (9th Cir. 2008).

106. Some of Governor Gregoire’s biggest financial contributors to her gubernatorial campaign included Emily’s List and NARAL Pro-Choice Washington. See Jim Brunner, *Candidates Hit on Abortion Stance Pro-Choice Event; GOP Pair Accused of Downplaying Anti-Abortion Views*, SEATTLE TIMES, Sept. 23, 2004, at B3 (“Emily’s List and NARAL Pro-Choice Washington have raised hundreds of thousands of dollars for the Gregoire . . . campaign. . .”). Emily’s List’s mission is to elect pro-choice women to office. See Emily’s List: Our Mission, <http://www.emilyslist.org/about/mission/> (last visited Nov. 16, 2008). NARAL Pro-Choice Washington lists Reproductive Rights at the top of its Issues page, and reports its organization of thousands of activists to support the Pharmacy Board’s rules. See NARAL Pro-Choice Washington: Issues, <http://www.prochoiceWashington.org/issues/> (last visited Nov. 16, 2008).

107. See Governor’s Letter Proposal, *supra* note 32. See also, Shannon, *supra* note 34 (“‘Planned Parenthood and 70 organizations that we worked with on this rule are elated,’ Amy Luftig, deputy director of public policy for Planned Parenthood Network of Washington, said.”).

108. Shannon, *supra* note 24, at 1B.

109. Phinney and Woodward, *supra* note 26, at A1.

110. Solomon, *supra* note 27, at A1.

111. See *supra* notes 29, 32, and accompanying text.

112. Cockerham, *supra* note 34, at A1.

113. Shannon, *supra* note 34, at 1A.

*Fill All Drug Orders, Including Plan B Pill, States Rules.*<sup>114</sup> The attention surrounding the controversy at Storman's pharmacy focused on the single issue of emergency contraception.<sup>115</sup> The headlines read *Boycott Brews Over Grocer's Plan B Stand*,<sup>116</sup> plus *Sides Vow to Continue Thriftway Plan B Standoff*,<sup>117</sup> as well as *Women Contest Plan B Stances*,<sup>118</sup> and *Plan B Pill's Unavailability Angers Women*.<sup>119</sup> Additional titles read *Plan B Legal Action Possible; Board Sends Thriftway Case to Legal Team*,<sup>120</sup> as well as *Pharmacy Board Ends Initial Ralph's Probe; Battle Over Whether to Sell Plan B Contraceptive to Continue*.<sup>121</sup> Although the language used by the government appeared to frame the issue broadly, the issue seemed apparent to those viewing the debate that its focus was emergency contraception.

#### 4. Individual Pharmacists: Concerned with the Effects of Emergency Contraception

Overall, the pharmacists' objections are related only to the specific medicine itself and not to the patients wishing to fill a prescription. The pharmacists and pharmacy in the *Stormans* case all objected to the possibility that Plan B could kill an innocent human being.<sup>122</sup> Stormans, Inc. refused to stock Plan B at its pharmacy when, after researching the drug, the company found that the manufacturer conceded that it may destroy a fertilized egg.<sup>123</sup> Ms. Thelen, a pharmacist in the lawsuit, said her conscience prevented her from taking part in "terminating innocent life that God created" by dispensing Plan B, because the drug prevented the implantation of a fertilized egg; to her, fertilization was all that was needed for characterization as a human being.<sup>124</sup> Rhonda Messler, the other pharmacist in the *Stormans* case, believed that life starts when an egg is fertilized, and that Plan B prevents a fertilized egg from implantation and destroys human life.<sup>125</sup>

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114. Ostrom, *supra* note 34, at B1.

115. See *supra* notes 36-39, and accompanying text.

116. Shannon, *Boycott Brews*, *supra* note 37, at 1A.

117. Shannon, *Sides Vow*, *supra*, note 37, at 1A.

118. Shannon, *Women Contest*, *supra* note 38, at 1A.

119. *Unavailability Angers Women*, *supra* note 38, at C2.

120. Shannon, *Board Sends Case*, *supra* note 38, at 1C.

121. Shannon, *Battle to Continue*, *supra* note 38, at 1A.

122. See Stormans, *supra* note 39, at B7.

123. *Id.*

124. See Declaration of Margo Thelen, *supra* note 41, at 2-3.

125. See Complaint for Civil Rights Violations and Declaratory and Injunctive Relief at 10, *Stormans v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (No. C07-5374), available at 2007 WL 2160604.

Pharmacists in the other cases held similar religious beliefs. In the *Vandersand* case, the pharmacist believed that emergency contraceptives can destroy developing innocent human life; he also believed that he was forbidden from participating in the death of a human life in any fashion.<sup>126</sup> The beliefs of the pharmacist in *Noesen* were similar, as he refused to fill a prescription after confirming the drug was going to be used as a contraceptive, and not simply to regulate a women's menstrual cycle, because the drug may reduce the likelihood of implantation for a "fertilized human ovum."<sup>127</sup> The objections of the pharmacists in *Menges* were also similar, believing Plan B to be the "earliest form of an abortion," terminating the implantation of a fertilized egg.<sup>128</sup> All of the pharmacists' stated reasons for not filling prescriptions in these cases were based on the effects of the medicine itself, and were not related to the identity of the patient requesting the drug.

In the end there remains a substantial faction avoiding any pronouncement of the true issue, hoping to ensure that the debate focuses one every potential patient against any alleged discrimination by a rogue pharmacist.<sup>129</sup> Unfortunately, this attempt to broaden the description of affected victims, although unsubstantiated, continues.<sup>130</sup> The other side remains worried about the effects of one type of drug and the human life they believe they are protecting.<sup>131</sup> The right of conscience was invoked

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126. See *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1054-55 (C.D. Ill. 2007).

127. See Weier, *supra* note 78, at 1A.

128. See *Anderson Cooper 360 Degrees*, *supra* note 66.

129. But see ILL. ADMIN. CODE tit. 68 § 1330.91, *supra* note 62 (specifically refers to prescriptions for contraceptives); *Blagojevich Takes Emergency Action*, *supra* note 62 (taking action to ensure access to emergency contraception).

130. The materials suggesting others could be victimized by conscience clauses have numerous ideas, but no authority. See sources cited *supra* notes 88-92. When this author has located articles that do cite an actual occurrence, they each refer to a prescription in Dallas for Ritalin that was allegedly refused. See *Pharmacists Fueling Birth-Control Debate*, WICHITA EAGLE (Kan.), May 1, 2005, at 9A, available at 2005 WLNR 23057220; Katie Fairbank, *Waging a Moral Battle From Behind the Counter Pharmacists' Refusal to Fill Contraception Prescriptions Prompts the Question: Whose Choice is it to Make?*, THE DALLAS MORNING NEWS, Apr. 24, 2005, at 1A; Basu Rekha, *Patient, Not Pharmacist, Gets to Decide What's Right*, THE DES MOINES REGISTER, Mar. 9, 2007, at 15A. Even the article cited in some reports, Tresa Baldas, *Fighting Refusal to Treat: 'Conscience Clauses' Hit the Courts*, NAT'L LAW J. (Feb. 7, 2005), available at [http://www.law.com/jsp/nlj/PubArticle\\_NLJ.jsp?id=1107550992\\_983](http://www.law.com/jsp/nlj/PubArticle_NLJ.jsp?id=1107550992_983), cites no specific data or incident. See Patricia L. Selby, *On Whose Conscience? Patients Rights Disappear Under Broad Protective Measures for Conscientious Objectors in Health Care*, 83 U. DET. MERCY L. REV. 507, 510 n. 24 (2006).

131. See *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007), stay denied, 526 F.3d 406 (9th Cir. 2008) (The "Supreme Court has recognized that reasonable people disagree over when life begins, and the refusal to participate in an act that one believes terminates a life has nothing to do with gender or gender

as a result of emergency contraception, not as a tool to turn away a patient for any reason.

*B. Unobstructed Access to Emergency Contraception: An Obtainable Goal?*

While attempting to divert the focus of the debate from being about emergency contraception,<sup>132</sup> and refusing to pay meaningful respect to the beliefs of conscientious pharmacists, those opposed to a pharmacist's right of conscience may continue their opposition until there is unobstructed access to all contraception.<sup>133</sup> The lengths that some would go for unobstructed access include strictly regulating, and even criminalizing, anything or anyone that would encumber access to contraception.<sup>134</sup> Where access to contraception was once strictly regulated,<sup>135</sup> one would think that a wide-reaching right to use contraception<sup>136</sup> would be sufficient, but in today's world, it appears *Griswold v. Connecticut*<sup>137</sup> has been flipped on its head. Where the issue

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discrimination.") (citing *Bray v. Alexandria Women's Clinic*, 506 U.S. 263, 271-74 (1993)).

132. See *supra* note 4 and accompanying parenthetical. Again, the author recognizes a few pharmacists, like Noesen, would like to make the debate about all contraceptives in general, but the majority of materials and opinions on the subject deals specifically with emergency contraception. See *supra* text accompanying note 78.

133. See Chandrasekhar, *supra* note 7, at 115 ("[G]uaranteeing women's ready access . . . is not an objective that can be sacrificed, but is an ideal of the utmost importance."); Nguyen, *supra* note 90, at 269 (arguing that Supreme Court privacy precedence secures "rights to uninhibited access to contraception"); Sarah Tomkowiak, Note, *Reconciling Principles and Prescriptions: Do Pharmacist Refusal Clauses Strike the Appropriate Balance Between Pharmacists' and Patients' Rights?*, 2007 U. ILL. L. REV. 1329, 1360 (2007) ("The right of a pharmacist to abide by her moral or religious principles . . . should never be allowed to infringe on a patient's right to access birth control."); Kyung M. Song, *Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES, Aug. 1, 2006, at A5 (quoting organizer of boycott of Ralph's Thriftway as saying that "[a]ll fertile women should have [Plan B] on hand").

134. See Tomkowiak, *supra* note 133, at 1332, 1351-60 (advocating adoption of stricter regulation and legislation), Cicconi, *supra* note 90, at 748-49 (encouraging narrow reading of conscience clauses to allow for tort liability or employer discipline), Smearman, *supra* note 6, at 540 (suggesting enactment of legislation and adoption of regulations).

135. See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). At issue in *Griswold* was a statute that made the use of contraception a criminal offense. *Id.* at 480.

136. See *Abortion and Birth Control*, *supra* note 5; Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237, 254-59 ("examin[ing] the cases that articulate a constitutional right to contraception"); Nguyen, *supra* note 90, at 256-61 (describing a right of privacy in a marital and individual setting, as well as the expansion of a right to privacy in reproductive matters); Tomkowiak, *supra* note 133, at 1332-34 (describing constitutional right to birth control).

137. 381 U.S. 479. *Griswold* is used in this Section only to illustrate how far legal access to contraceptives has shifted. This Comment is not examining the specific right to

was once the government intruding in an individual's childbearing decisions, now it revolves around the government intruding in professional's decisions guided by conscience and morality.<sup>138</sup> The issue, both then and now, dealt with access to contraception; where there was once no access, pharmacists today who would prefer that emergency contraception be accessed from other outlets are being forced by state regulations to prescribe the medication.<sup>139</sup> The debate has developed into a situation where one side prefers a professional to lose his or her job and move out of state,<sup>140</sup> rather than require a woman to visit more than one store to fill a prescription.<sup>141</sup> At some point those opposed to pharmaceutical choice will have to be content with the major strides they have made in the area of contraceptives. Claims that access is a major inconvenience and that total access is necessary are unrealistic because of the numerous avenues currently available to emergency contraception.

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use contraceptives, and, therefore, will not go into much detail on the case itself. See sources cited *supra* note 136 for more detailed discussions on the case.

138. See sources cited *supra* note 133-36. See also cases cited *supra* notes 8-11.

139. See generally ILL. ADMIN. CODE tit. 68 § 1330.91, *supra* note 62; WASH. ADMIN. CODE §§ 246-863-095, 246-869-010, *supra* note 16; WIS. ADMIN. CODE Phar § 10.03(2), *supra* note 79.

140. See, e.g., Declaration of Margo Thelen, *supra* note 41, at 3-4 (Individual pharmacist concerned with prospects of continuing employment in the profession after being forced to leave previous job because of state regulations, and receiving no guarantees of job protection under the current regulations in current pharmaceutical job. The current job was taken at a considerable distance from home.); Jim Suhr, *Religious Group Targets Walgreens: Claims 3 Pharmacists 'Effectively Fired' Over Morning-After Pill*, CHICAGO SUN TIMES, Dec. 8, 2005, at 46 (turning down job offered in Missouri because not licensed there, less pay, and no guarantee of store location after disciplined at job because of Illinois regulations); Torriero and Flynn, *supra* note 69, at 1 (refusing job offered in other state, for less money, as compromise to losing job because of state regulations).

141. During Planned Parenthood's presentation to the Washington Board of Pharmacy, one of the concerns about letting pharmacists decline the filling of prescriptions because of moral, or religious beliefs, was the effect on women who lived in rural areas where one pharmacist served a whole community. Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* note 23, at 7-8. The presenter expressed that locating an alternative pharmacy when a prescription was refused was more than a minor inconvenience when someone must go to a different town or across town to get a prescription filled. *Id.* See also Holly Teliska, Note, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229; Susan Paynter, *Pharmacy Ruling is Bad Medicine*, SEATTLE POST-INTELLIGENCER, June 7, 2006, at E1 ("[W]hen it's you standing at the counter with prescription in hand and time ticking away, having to shop for a druggist who's willing to do his job is more than a mere inconvenience. It's an outrage.").



### 1. Access to Emergency Contraception: Available Widely Enough?

A major issue in the ongoing debate surrounding emergency contraception is access. Most contentions with the issue of access to contraception focus on its availability.<sup>142</sup> In the court cases and regulations represented in this Comment,<sup>143</sup> part of the reasoning inherent in the arguments against an individual's right of conscience includes concerns of availability of emergency contraception.<sup>144</sup> The reasoning that pharmacists should not be allowed protection by a right of conscience, because it could lead to unavailability of contraception in certain areas, is usually met with responses of the ease of access to the medication.<sup>145</sup> The multiple avenues of access to emergency contraception, and sources available to guide patients to dispensing pharmacies and organizations, shows that access is not a major inconvenience.

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142. See, e.g., Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* note 23, at 7 (presenting that greatest impact of pharmacists declining to fill emergency contraception prescriptions is upon women in areas where few alternatives are available); Shannon, *Boycott Brews* (reporting boycott started when storeowner refused to make emergency contraception available at supermarket pharmacy even though pharmacy willing to direct patient to other nearby pharmacies where contraception is available).

143. See cases cited *supra* notes 8-11 and regulations cited *supra* notes 12, 16, and 62.

144. This line of reasoning showed up in the *Stormans* case. See, e.g., *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1255 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008) (presenting defendant-intervenors that had trouble with, or were concerned with, obtaining emergency contraception). The reasoning also was present in the Washington and Illinois rulemaking process. See Summary and Purpose of Amendments, 29 Ill. Reg. 13639 (Sept. 9, 2005) (The summary and purpose accompanying the Illinois regulation stated that the regulation "address[es] the critical public health care issue of access to prescription contraceptives."); *supra* note 141 and accompanying text. The majority of the criticisms of the Department of Health and Human Service's new regulation also included this concern. See Editorial, *A Parting Shot at Women's Rights*, N.Y. TIMES, Dec. 26, 2008, at A38 (discussing the new regulation and its hindrance to accessing contraception); Chris Frates, *Women Groups Bash Bush Birth Control Rule*, Dec. 16, 2008, available at <http://www.politico.com/news/stories/1208/16607.html> (stating reproductive rights groups view the new Department of Health and Human Resources regulation as restricting to birth control access); Deborah Kotz, *New Government Rule Could Limit Your Access to Birth Control*, U.S. NEWS & WORLD REPORT, Dec. 18, 2008, available at <http://www.usnews.com/blogs/on-women/2008/12/18/new-government-rule-could-limit-your-access-to-birth-control.html>.

145. See, e.g., Washington State Department of Health Board of Pharmacy, Meeting Minutes, *supra* note 23, at 8-9 (recording of comments from audience in response to Planned Parenthood and Northwest Women's Law Center included response that there was no "crisis of availability or access" because emergency contraception was available through mail order, internet, and Planned Parenthood Health Center).

The *Stormans* decision makes the best argument that a pharmacist refusing to fill a prescription does not create a major inconvenience to accessing emergency contraception.<sup>146</sup> In *Stormans*, the court stated that “lack of access to Plan B” had not been demonstrated, and that the concerns over availability were not “compelling.”<sup>147</sup> The court had not been presented with evidence that access to emergency contraception was a problem.<sup>148</sup> In Washington, Plan B can be obtained at doctors’ offices, health centers, emergency rooms, Planned Parenthood, through the internet, and at most pharmacies.<sup>149</sup> A survey relied on by the court stated that only two out of 121 responding pharmacies in Washington did not stock emergency contraceptives for “religious or personal reasons.”<sup>150</sup> Even though there were pharmacies that did not stock the medication, the court had no evidence that anyone had failed to fill a prescription for emergency contraception because they were turned away by a pharmacist or could not find a pharmacy that stocked the medication in Washington.<sup>151</sup> Even the defendant-intervenors in the case, who shared personal examples of being turned away by pharmacists, when presenting a prescription for Plan B, ultimately were able to obtain Plan B within the drug’s time of effectiveness.<sup>152</sup>

The court also viewed some of the statements present in the rulemaking process as evidence that there was not a dire inconvenience to access Plan B.<sup>153</sup> One of the statements cited was a letter from the Washington State Pharmacy Association to the governor, displaying the efforts of Washington pharmacists to improve public health,<sup>154</sup> and how such programs were a national model.<sup>155</sup> The court viewed the letter as evidence that the association did not view access to Plan B as a “significant issue.”<sup>156</sup> Also viewed as evidence, was the fact that the Board of Pharmacy’s initial draft rule permitted a pharmacist to deny a

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146. *Stormans*, 524 F. Supp. 2d at 1260-63.

147. *Id.* at 1263.

148. *Id.* at 1260.

149. *Id.*

150. *Id.*

151. *Stormans*, 524 F. Supp. 2d at 1260.

152. *Id.* at 1254-55.

153. *Id.* at 1260.

154. One such program that may have been referenced in the letter is a project piloted in Washington by PATH that enabled pharmacists to provide emergency contraception directly to women. See PATH.org, PATH Helps Emergency Contraception Become More Accessible in Washington State, [http://www.path.org/projects/EC\\_WAstate.php](http://www.path.org/projects/EC_WAstate.php) (last visited Dec. 29, 2008).

155. *Stormans*, 524 F. Supp. 2d at 1260.

156. *Id.*

prescription for conscience reasons.<sup>157</sup> This was not viewed as evidence of there being no problem of access, but that if there was a problem, it did not outweigh a pharmacist's right of conscience.<sup>158</sup> Thus, as illustrated in *Stormans*, the argument that there is a problem with access to emergency contraception is not as severe as presented, and the options available to women seeking emergency contraception are adequate to ensure access.

## 2. Total Access: A Necessary Conclusion?

Total uninhibited access to any medicine, let alone a controversial one, is probably an unrealistic goal. Although the goal may be unrealistic, it does not stop the organizations from striving for uninhibited or universal access to emergency contraception.<sup>159</sup> Granted, many organizations, and other proponents of more convenient access, fear that access to emergency contraception may become significantly restricted,<sup>160</sup> and even less accessible in some areas,<sup>161</sup> but it does not follow that the solution should be uninhibited access.

Although many accounts exist of women with prescriptions for emergency contraception being turned away at the pharmacy counter,<sup>162</sup> it appears unnecessary to suggest that the solution is convenient access for all. Many strides have been made by the organizations referenced in this Comment to make emergency contraception more convenient to acquire,<sup>163</sup> but the logistics of removing every inconvenience appear unrealistic. Very few state, federal, or constitutional rights, if any, guarantee that any specific right is protected above all other

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157. *Id.* See also Phinney and Woodward, *supra* note 26, at A1; Solomon, *supra* note 27, at A1; Statement from Governor, *supra* note 28.

158. *Stormans*, 524 F. Supp. 2d at 1260.

159. One organization suggests that all women should possess the medication as a just-in-case measure. See PATH.org, Key Facts About Emergency Contraception, [http://www.path.org/files/RH\\_ec\\_factsheet.pdf](http://www.path.org/files/RH_ec_factsheet.pdf) (last visited Dec. 29, 2008).

160. See generally, *supra* notes 87, 90-92, 133, 144 and accompanying text.

161. See *supra* note 141 and accompanying text.

162. See *supra* note 3. See also Chandrasekhar, *supra* note 7, at 55-56 (describing occurrences of women being turned away by pharmacist when presenting an emergency contraception prescription); Kubasek, et al., *supra* note 7, at 225 (introducing topic with a statement on increasing amount of women being turned away with prescriptions for emergency contraception); Davis, *supra* note 99, at 97 (relating story of women unsuccessful in attempts to fill emergency contraceptive prescription); Kriesel, *supra* note 7, at 337 (allowing pharmacists to cite conscience as reason not to fill prescription is a "scenario [that] has played out in many pharmacies across the country"); Teliska, *supra* note 141, at 229 (using story of Wisconsin student with contraception prescription turned away at pharmacy).

163. See, e.g., PATH.org, *supra* note 154.

considerations and circumstances.<sup>164</sup> Even First Amendment rights of free speech,<sup>165</sup> and freedom of religion have limitations.<sup>166</sup> A right to procure contraception should be no different;<sup>167</sup> there are limitations as to how convenient procuring emergency contraception can be.

States like Washington and Illinois may have attempted to regulate pharmacies and pharmacists in a way to make access more convenient for women seeking emergency contraception,<sup>168</sup> but the attempts to prioritize a right to contraceptives have been shown to have limitations. Washington attempted to ensure an unobstructed right to obtain contraception in a regulation that called for dispensing all legally prescribed drugs.<sup>169</sup> Unfortunately, an owner of a pharmacy and two Washington pharmacists did not agree that it could be forced into dispensing medication it believed could take human life.<sup>170</sup> Consequently, Washington pharmacists received an injunction against the regulation in federal court, and a pharmacist's right of conscience was recognized as an acceptable expression of the freedom of religion.<sup>171</sup> Illinois' attempt to give a priority to the right to obtain contraception was a more straightforward approach. The regulation passed in Illinois ordered all legal prescriptions for contraception to be filled.<sup>172</sup> This attempt to promote an advanced right of women to obtain contraception was met with the inconvenience of dealing with pharmacists like Menges and Vandersand that were unwilling to participate in any process that may take the life of a developing human being.<sup>173</sup> In the cases of

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164. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.").

165. See, e.g., *id.* at 2799 ("Of course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not."). Speech protected by the First Amendment is "subject to reasonable time, place, or manner restrictions." See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

166. See, e.g., *United States v. Lee*, 455 U.S. 252, 257 (1982) ("Not all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.") (citations omitted).

167. See *supra* note 5. The ACLU has stated in a recent report that there is no federal constitutional right to obtain contraception. SONDRAGOLDSCHIN, ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACCESSING BIRTH CONTROL AT THE PHARMACY 26 (2007), available at [http://www.aclu.org/images/asset\\_upload\\_file576\\_29402.pdf](http://www.aclu.org/images/asset_upload_file576_29402.pdf).

168. See ILL. ADMIN. CODE tit. 68 § 1330.91, *supra* note 62; WASH. ADMIN. CODE §§ 246-863-095, 246-869-010, *supra* note 16.

169. WASH. ADMIN. CODE §§ 246-869-010(1).

170. See *Stormans*, *supra* note 39, at B7.

171. *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1264, 1266 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008).

172. ILL. ADMIN. CODE tit. 68 § 1330.91, *supra* note 62.

173. See *supra* notes 126, 128 and accompanying text.

Menges and Vandersand,<sup>174</sup> the pharmacist's right of conscience was also recognized as a possible overriding consideration to the attempts of universal availability of emergency contraception.<sup>175</sup>

In the pharmaceutical cases brought forth in Washington and Illinois, the courts recognized that the regulations appeared to be aimed at specific pharmacies and pharmacists with moral and religious objections to emergency contraception.<sup>176</sup> The regulations themselves could not deliver what they had hoped to provide—unobstructed access to contraception—and even the wording of the regulations pointed out circumstances that would limit these goals. The Washington regulations excuse pharmacists from filling prescriptions during state or federal emergencies or where there is no specialized equipment to deal with a particular medicine or lack of expertise needed to dispense a drug.<sup>177</sup> Other limitations include exemptions when the medicine is not in stock after good faith compliance to maintain an adequate stock, and when a prescription is fraudulent, erroneous, or inadequate.<sup>178</sup> The regulations also provide for an exception when contraindications are present.<sup>179</sup> The Illinois regulation also provides for fraud, contraindications, and any screening for drug therapy problems including any misuse, dosage problems, or interaction with other drugs or foods.<sup>180</sup> Within the structure of the regulations themselves, limitations are recognized that show that even regulations cannot remove all inconveniences.

Easily recognized are the strides that have been made to effect more readily available emergency contraception, but no amount of action can be exerted to realize an unobstructed right to emergency contraception.<sup>181</sup> Some women may be inconvenienced in their attempt to fill prescriptions for the medication, but, overall, emergency contraceptives are relatively easy to access.<sup>182</sup> Most women have more than one available venue to fill their prescriptions.<sup>183</sup> Evidence shows that many feel that emergency

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174. *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007); *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006).

175. 525 F. Supp. 2d at 1057; 451 F. Supp. 2d at 1003.

176. 524 F. Supp. 2d at 1259 (“The evidence . . . strongly suggests that the overriding objective of the subject regulations was . . . to eliminate moral and religious objections from the business of dispensing medication.”); 451 F. Supp. 2d at 1001.

177. WASH. ADMIN. CODE §§ 246-869-010(1)(b) and (c).

178. *Id.* at (a), (d) and (e).

179. *Id.* at (a). “Contraindication” is a medical term indicating the inadvisability of medical drug or a symptom or condition that makes a treatment or procedure inadvisable. THE AMERICAN HERITAGE COLLEGE DICTIONARY 311 (4th ed. 2004).

180. ILL. ADMIN. CODE tit. 68 § 1330.91(1) and (3).

181. See, e.g., PATH.org, *supra* note 154.

182. See *supra* Part III.B.1.

183. See, e.g., *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1260 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008) (Plan B “can be accessed through

contraception is already widely available, and accessibility is not a significant issue.<sup>184</sup> Also, the goal of unobstructed access to emergency contraception does not appear to be necessary, or even realistic.<sup>185</sup> Although cries for greater availability are accompanied by the stories of women being turned away at the pharmacist's counter,<sup>186</sup> there appears to be little evidence that these women have not ultimately filled their prescriptions in a timely fashion.<sup>187</sup> Certainly, convenience is an admirable goal in many contexts, but it cannot be accomplished at the expense of others' rights. The recent cases, and even the regulations themselves, show that there will always be limitations to the desired convenience of obtaining emergency contraception.

*C. Right of Conscience or Right of Access: Which Protection Takes Precedence?*

One side desires unobstructed access to emergency contraception; another side only wishes to perform their jobs without compromising their morals; in the end, the debate comes down to which side's rights should take precedence. Whether a pharmacist can rely on a right of conscience to protect his or her professional standing while declining to dispense emergency contraception may depend on the strength of the cases and rule referenced herein.<sup>188</sup> Currently, with many foreseeable changes on the horizon, the law may be at an apex of protection for a pharmacist's right of conscience. Ultimately, the strength of the cases will depend on the circumstances of the next controversy to come along,<sup>189</sup> and, in the context of federal regulation, will depend on the actions of the next administration.<sup>190</sup> Any remaining protection probably resides in

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physicians' offices, certain government health centers, hospital emergency rooms, Planned Parenthood and the internet.").

184. See *supra* notes 154-56 and accompanying text.

185. See *supra* Part III.B.2.

186. See *supra* note 162.

187. See, e.g., *supra* note 152 and accompanying text.

188. See cases cited *supra* notes 8-11 and regulation cited *supra* note 12.

189. The decisions in *Stormans* and *Menges* may provide only temporary protection for a pharmacist's right of conscience. In *Stormans*, the plaintiffs won a preliminary injunction that will remain pending trial or "until further proceedings result in a modification or dissolution of th[e] preliminary injunction." *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008). In *Menges*, the plaintiff survived motions to dismiss by stating a claim for free exercise violations and a claim that Title VII may preempt the state regulation. *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1002-05 (C.D. Ill. 2006). See also *Stormans*, 524 F. Supp. 2d at 1266.

190. Throughout the criticisms of the proposed Health and Human Services rule, it was reported that then-Senator Obama signed a letter to Department of Health and Human Services Secretary Mike Leavitt, along with twenty-seven other senators, to convince the secretary to dismiss the rule. See Frates, *supra* note 144. After the final

the rights guaranteed by the Free Exercise Clause of the First Amendment.<sup>191</sup>

1. Pharmacist's Right of Conscience: Are Claims of a Violation of Freedom of Religion Sufficient for Protection?

The preliminary injunction granted in the *Stormans* case relied on the finding that the plaintiffs had proven the existence of a reasonable First Amendment claim.<sup>192</sup> By doing so, the court has allowed a greater protection to pharmacists relying on a right of conscience informed by religious beliefs. In the court's strict scrutiny analysis for the First Amendment claims, it looked to see if the regulations were neutral on the subject of religion, and whether they were generally applicable.<sup>193</sup>

Relying heavily on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>194</sup> the court not only looked to see if the regulations were facially neutral, but also if the government had overtly masked its hostility towards those motivated by religion.<sup>195</sup> Because the regulations were not found to be facially neutral, the court turned to the historical background of the challenged regulations, as well as their effect in operation, for evidence of the regulations purpose.<sup>196</sup> After reviewing the party's arguments, the court ruled that the evidence "strongly suggest[ed]" the purpose of the regulations was to stop a pharmacist from refusing to dispense medication because of religious or moral objections.<sup>197</sup> The court reasoned that the "prominent role" played by certain parties in the rulemaking process with the Board of Pharmacy<sup>198</sup> and the governor,<sup>199</sup> and the governor's reactions to the first draft of the rule,<sup>200</sup> showed that the focus was on Plan B and pharmacists that opposed dispensing the drug because of religious motivations.<sup>201</sup> The process behind the regulation led the court to believe the regulations

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rule was published, reports cite then-President-elect Obama's administration as more than likely to take steps to overrule the regulation. See Stout, *supra* note 12 ("virtually certain to" undo the regulation).

191. U.S. CONST. amend. I; *Stormans*, 524 F. Supp. 2d at 1266.

192. 524 F. Supp. 2d at 1266.

193. *Id.* at 1257-63.

194. 508 U.S. 520 (1993).

195. *Stormans*, 524 F. Supp. 2d at 1257-60.

196. *Id.* at 1258-60.

197. *Id.* at 1259.

198. *Id.* See also *supra* notes 23, 98-99 and accompanying text.

199. *Stormans*, 524 F. Supp. 2d at 1259. See also *supra* notes 27-28, 30, 106-107 and accompanying text.

200. *Stormans*, 524 F. Supp. 2d at 1259. See also *supra* notes 28-29 and accompanying text.

201. *Stormans*, 524 F. Supp. 2d at 1259.

“targeted the religious practices of some citizens and are therefore not neutral.”<sup>202</sup>

Because the government cannot selectively impose burdens on “conduct motivated by religious belief,”<sup>203</sup> the court looked to see if the regulations were applied generally.<sup>204</sup> The court first cited the focus of the media coverage during the controversy as being on Plan B,<sup>205</sup> and was also unconvinced by the defendants’ attempt to change the focus to a broader universal access to all legally prescribed medication.<sup>206</sup> The court also cited the exemptions in the regulations and enforcement clauses as further evidence that any apparent changes to the pharmaceutical system in Washington were really targeted at a few medications and a few pharmacists operating under their conscience.<sup>207</sup> The court concluded that the means used by the regulators did not fit with the ends of universal protection of all lawfully prescribed medications.<sup>208</sup> The regulations did not appear to the court to be generally applicable; rather they targeted religious practice.<sup>209</sup> Therefore, being neither neutral, nor generally applicable, the court subjected the regulations to strict scrutiny.<sup>210</sup>

Promotion of health could certainly be a compelling interest that would survive strict scrutiny of a law that targeted religious conduct,<sup>211</sup> but the court was convinced that the regulations promoted interests that were more about convenience and “heartfelt feelings,” than with actual access to medication.<sup>212</sup> A right to easily obtain contraception did not, in the court’s judgment, justify the “substantial burden” that was placed on the pharmacists’ free exercise of religion.<sup>213</sup> A patient could fail to obtain Plan B within its time of effectiveness under suitable exceptions in the regulations just as likely as at the hands of a conscientious pharmacist, therefore making the sanctions against such pharmacists unjustifiable.<sup>214</sup> The court concluded that there was not a compelling state interest that was narrowly tailored enough to override the plaintiff’s right to free exercise of religion.<sup>215</sup>

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202. *Id.* at 1260.

203. *Id.*

204. *Id.* at 1260-63.

205. *Id.* at 1260. *See also supra* Part III.A.3.

206. *Stormans*, 524 F. Supp. 2d at 1260.

207. *Id.* at 1261-62.

208. *Id.* at 1263.

209. *Id.*

210. *Id.* at 1263-66.

211. *Stormans*, 524 F. Supp. 2d at 1263.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1264.



Before reaching its final conclusion, the court considered five cases.<sup>216</sup> Two of the cases were the infamous Supreme Court First Amendment cases *Lukumi*<sup>217</sup> and *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>218</sup> The court stated that the objective of the regulations in the current case may be similar to the one targeting religious practice in *Lukumi*.<sup>219</sup> On the other side of the spectrum, the court stated that the current case was unlike the law that was found to be neutral, of general application, and no intent to target religion, in *Smith*.<sup>220</sup>

Also cited was a decision written by then-Circuit Judge Alito applying *Smith* and *Lukumi*, *Blackhawk v. Pennsylvania*.<sup>221</sup> In *Blackhawk*, the court ruled that a law is not generally applicable if it exempts conduct that is not religiously motivated, but does not exempt the similar conduct that is religiously motivated.<sup>222</sup> Apparently, the *Stormans* court felt that the *Blackhawk* case was persuasive.<sup>223</sup> The evidence the court had before it suggested that the Washington regulations in question exempted some examples that obstructed access to medications, but not religiously motivated ones.<sup>224</sup>

Another Third Circuit case that was examined, *Anspach v. City of Philadelphia, Dept. of Public Health*,<sup>225</sup> was offered by the defendant-intervenors.<sup>226</sup> The case was submitted because it ruled that a state's

216. *Id.* at 1264-66 (considering *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), *Anspach v. City of Philadelphia, Dept. of Public Health*, 503 F.3d 256 (3d Cir. 2007), *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), and *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006)).

217. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

218. 494 U.S. 872 (1990).

219. *Lukumi*, 508 U.S. at 534 (concluding that main component of the religious practice was being suppressed); *Stormans*, 524 F. Supp. 2d at 1264.

220. *Stormans*, 524 F. Supp. 2d at 1264. The court summarized the law preventing illicit drug use in *Smith* as applying to all, except those with a medical prescription. *Id.* The exception was allowed because it was "consistent with the general purpose" of the law passed to prevent illicit drug abuse. *Id.* See also, *Smith*, 494 U.S. at 884-90 (concluding "that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest").

221. 381 F.3d 202 (3d Cir. 2004); *Stormans*, 524 F. Supp. 2d at 1264-65.

222. *Id.* at 209 (citing *Lukumi*, 508 U.S. at 537, 543-46, and *Smith* 494 U.S. at 878, 884). In *Blackhawk*, at issue was whether an individual's freedom of religion rights were violated when the state did not exempt *Blackhawk's* use of black bears for Lakota ritualistic purposes. *Id.* at 204. The state required permits for possession of wildlife, but exempted zoos and circuses, and waived fees in certain hardship circumstances. *Id.* at 205.

223. *Stormans*, 524 F. Supp. 2d at 1265.

224. *Id.*

225. 503 F.3d 256 (3d Cir. 2007).

226. *Stormans*, 524 F. Supp. 2d at 1265.

action must be compulsory or coercive in nature to be a substantial burden on religious expression.<sup>227</sup> In *Anspach*, the state did not “compel an individual to act contrary to his religious beliefs,”<sup>228</sup> but in the *Stormans* case, according to the evidence available to the court, the burdens placed upon the plaintiffs were intentional and substantial.<sup>229</sup> The regulations coerced the Washington pharmacists to act contrary to their beliefs.<sup>230</sup> Finally, the court also commented that *Menges*<sup>231</sup> was persuasive authority supporting the court’s conclusions.<sup>232</sup> The facts were found to be substantially similar between the cases, and because a free exercise claim was stated as a claim in *Menges*,<sup>233</sup> it helped support the conclusion in *Stormans*.<sup>234</sup>

The court’s decision in *Stormans* has had its share of critics,<sup>235</sup> most notably a Ninth Circuit Judge dissenting in the denial of a motion to stay the injunction.<sup>236</sup> One of the dissenting judge’s main contentions was that the district court had applied the wrong legal standard because it had relied on a section of *Lukumi* that was not signed by a majority of the court,<sup>237</sup> allowing for the consideration of legislative history to see if the regulation had a discriminatory purpose.<sup>238</sup> Consequently, the dissenting opinion states the regulations should have been found to be neutral.<sup>239</sup>

Other critics of the decision believe the court jumped into abortion jurisprudence to help overcome claims of gender discrimination that may have more weight under contraception jurisprudence.<sup>240</sup> Accordingly, a

227. *Anspach*, 503 F.3d at 272. See also *Stormans*, 524 F. Supp. 2d at 1265.

228. *Anspach*, 503 F.3d at 272 (quoting *Arnold*, 880 F.2d 305, 314 (11th Cir. 1989)). In *Anspach*, the plaintiffs alleged a violation of their First Amendment religious freedom rights when their daughter was provided with emergency contraception. *Id.* at 258-59. See also, *Stormans*, 524 F. Supp. 2d at 1265.

229. 524 F. Supp. 2d at 1265.

230. *Id.*

231. *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006).

232. *Stormans*, 524 F. Supp. 2d at 1266.

233. *Menges*, 451 F. Supp. 2d at 1002.

234. *Stormans*, 524 F. Supp. 2d at 1266. But see *id.* (commenting that the *Menges* case was decided under a different standard of review).

235. See, e.g., Elizabeth Gerber, *Emergency Contraception: Legal Consequences of Medical Classification*, 36 J.L. MED. & ETHICS 428; Marci Hamilton, *Why A Federal District Court Was Wrong to Apply Strict Scrutiny to a Washington State Law Requiring Pharmacies, But Not Individual Pharmacists, to Fill “Plan B” Prescriptions*, FINDLAW, Nov. 15, 2007, <http://writ.news.findlaw.com/hamilton/20071115.html>.

236. *Stormans Inc. v. Selecky*, 526 F.3d 406, 409-18 (9th Cir. 2008) (Tashima, J., dissenting).

237. *Id.* at 413-14 (citing Part II-A-2 of *Lukumi*). See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 540-42 (1993) (plurality opinion).

238. *Stormans Inc.*, 526 F.3d at 413-14. See *Lukumi*, 508 U.S. at 540-42 (“Relevant evidence includes . . . legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”).

239. *Stormans Inc.*, 526 F.3d at 414.

240. See Gerber, *supra* note 235, at 428.

sex-discrimination claim would have been much harder to dismiss by the court.<sup>241</sup> In the critics' opinions, the court had jumped to this line of cases because the plaintiffs viewed the emergency contraception's effects as abortifacient.<sup>242</sup> Whether a sex discrimination claim holds weight against a free exercise claim may depend on the legal classification of Plan B as an abortion or a contraceptive. In *Stormans*, the court stopped just short of making such a classification.<sup>243</sup>

Whether these suggested errors<sup>244</sup> will be sufficient to disregard *Stormans* as authority in the debate over a pharmacist's right of conscience remains to be seen. As of this Comment, the case has been cited positively for free exercise rights by other courts.<sup>245</sup> If that trend continues, *Stormans* may be considered as a reliable protection for a pharmacist's right of conscience. Seemingly, the only steps the court could have taken to make a stronger case, and perhaps be criticized more venomously,<sup>246</sup> would be to either classify emergency contraception as an abortifacient or suggest a pharmacist's right of conscience was as compelling as the right of conscience allowed in the abortion context.

## 2. Federal Regulation: Broad Enough to Protect Pharmacists Opposed to Prescribing Emergency Contraception?

The stated purpose of the Health and Human Resources regulation to ensure conscience protection was to protect individual objections to abortion within the field of health services.<sup>247</sup> A fear of many critics when the rule was first proposed was that the rule could be construed to extend protection to pharmacists who did not wish to dispense emergency contraception.<sup>248</sup> This fear may have been realized when the final rule was published. Many of the accounts covering the final rule

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241. *Id.* at 429.

242. *Id.* (The court applied the precedent "because the plaintiffs consider [emergency contraception] to be abortion."). An "abortifacient" is any agent used to induce an abortion. THE AMERICAN HERITAGE COLLEGE DICTIONARY 4 (4th ed. 2004).

243. *Id.* ("In failing to answer [the question of whether emergency contraception is abortifacient], the court nevertheless effectively granted [emergency contraception] abortifacient status by privileging the plaintiffs' view."). See *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008).

244. See *supra* notes 237, 240.

245. See *Morr-Fritz, Inc. v. Blagojevich*, No. 104692, 2008 WL 5246307, at \*9 (Ill. Dec. 18, 2008).

246. See *supra* notes 237, 240 and accompanying text.

247. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072, 78096-97 (Dec. 19, 2008).

248. See Pear, *supra* note 14, at A17.

believe the rule does in fact protect pharmacists.<sup>249</sup> Because the rule became effective only one day before the a President was inaugurated,<sup>250</sup> the effects of the regulation may be limited as reports suggest the new administration lists overturning the rule as a priority after the new President takes office.<sup>251</sup>

The protection for a pharmacist's right of conscience may come down to the freedom of exercise protection recognized in *Stormans*.<sup>252</sup> Under circumstances where certain pharmacists are targeted because of their religious beliefs, a claim of a violation of one's freedom of exercise may be the strongest appeal to overcome any governmentally-induced burden. Although recent regulation may appear to provide some added protection,<sup>253</sup> the current political circumstances suggest any protection will be very short-lived.<sup>254</sup>

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249. See Stein, *supra* note 12, at A10 (“[HHS Secretary] Leavitt initially said the regulation was intended primarily to protect workers who object to abortion. The final rule, however, affects a far broader array of services, *protecting workers who do not wish to dispense birth control pills, Plan B emergency contraceptives and other forms of contraception they consider equivalent to abortion*, or to inform patients where they might obtain such care.”) (emphasis added); Stout, *supra* note 12 (The final rule “bars hospitals, clinics, doctors’ office and *pharmacies* from forcing their employees to assist in programs and activities financed by the department.”) (emphasis added).

250. 73 Fed. Reg. at 78096 (“This final rule becomes effective 30 days after publication.”). The rule was published December 19, 2008. *Id.* at 78072. The inauguration of President Barack Obama was January 20, 2009. See Joint Congressional Committee on Inaugural Ceremonies, available at <http://inaugural.senate.gov/> (last visited Jan. 9, 2009).

251. See Frates, *supra* note 144 (Senator Patty Murray announced through her office that “[w]e’re certainly going to work with the Obama administration to rescind it through executive order, or we’ll work to pass legislation as early as possible”); Stein, *supra* note 12, at A10 (reporting that “[c]ritics began consulting with the incoming Obama administration on strategies to reverse the regulation as quickly as possible”); Stout, *supra* note 12 (reporting that the new administration is “virtually certain to” overturn the regulation). By way of update, see Noam N. Levey, *Bush-era ‘conscience’ rule gets another look; Policy that lets health workers deny abortion care may be revoked*, LOS ANGELES TIMES, Feb. 27, 2009, at A10 (“the Obama administration today will move to rescind a controversial rule that allows healthcare workers to deny . . . family planning services if doing so would violate their moral beliefs”); Rob Stein, *Health Workers’ ‘Conscience’ Rule Set to Be Voided*, WASH. POST, Feb. 28, 2009, at A01; David Stout, *Move Toward Undoing Rule On Abortion*, N.Y. TIMES, Feb. 28, 2009, at A16 (“The Obama administration moved Friday to undo a last-minute Bush administration rule granting broad protections to health workers who refuse to take part in abortions or provide other health care that goes against their consciences.”).

252. *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008).

253. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008).

254. See *supra* note 251 and accompanying text.

*D. Good-Faith Professional Guidelines: A Reasonable Compromise?*

If states wish to provide more access to emergency contraception and avoid controversies that are similar to the cases discussed in this Comment,<sup>255</sup> the states may have to allow pharmacists the option to “refuse and refer.”<sup>256</sup> In return, the states could enforce professional guidelines to limit inconveniences caused by the referrals.<sup>257</sup> Although each side of the debate may have to compromise to some degree, the end result may provide each with a desired outcome. Pharmacists that perform their duties within the confines of their religiously informed conscience would be able to avoid being forced to fill an emergency contraceptive prescription, and proponents of wider access to contraception would be able to ensure any inconvenience was not compounded by any unprofessional methods or attitudes. Granted, there will be some individuals not satisfied with either compromise, but the end result will help reduce controversies.

Arguably, the controversy in Washington State could have been avoided if the original draft of the regulations had been adopted because the original draft would have allowed a Washington pharmacist to refer the customer to another pharmacy.<sup>258</sup> Under the adopted regulation, the pharmacist could refer only if another pharmacist was on duty at the time to fill the prescription.<sup>259</sup> This approach burdens all pharmacies that could not afford to place more than one pharmacist on duty at one time.<sup>260</sup> There would still be inconveniences in smaller communities where pharmacists did not handle emergency contraception, but other

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255. See cases cited *supra* notes 8-11.

256. “Refuse and refer” is a phrase used to refer to the practice allowing a pharmacist to refuse to fill a prescription for emergency contraception and refer the patient to another pharmacist or pharmacy to dispense. See *Stormans*, 524 F. Supp. 2d at 1248-49.

257. But see Jennifer E. Spreng, *Pharmacists and the “Duty” To Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215, 269-73 (explaining why “extrapolating duties from professionalism standards is unwise”).

258. See Phinney and Woodward, *supra* note 26, at A1.

259. See Cockerham, *supra* note 34, at A1; Ostrom, *supra* note 34, at B1.

260. See Deborah Kotz, *Your Doctor’s Rights Vs. Your Rights*, U.S. NEWS & WORLD REPORT, Sept. 22, 2008, available at <http://www.usnews.com/blogs/on-women/2008/9/22/your-doctors-rights-vs-your-rights.html>. The article contains an interview with the vice-president of the National Women’s Law Center. *Id.* In response to a question about patient’s rights and employer accommodations, the vice-president responds that “a large pharmacy chain with several pharmacists on duty can afford to have one pharmacist who won’t dispense birth control if others behind the counter will. A small family-owned shop may not be able to do that.” *Id.* See also Nicholas, *supra* note 39, at 69 (“[M]ost large pharmacy chains have created internal policies that allow religious objectors to refuse to dispense drugs to which they object if another pharmacist is on hand to fill the prescription . . . such an accommodation isn’t possible for smaller stores which typically employ only one pharmacist at a time.”).

avenues of access could be advertised and encouraged in those areas, such as a telephone hotline or Internet web page.<sup>261</sup>

Pharmacists' professional responsibilities would make women's experiences slightly less inconvenient and embarrassing.<sup>262</sup> First, pharmacists would be required to let their employer know that their beliefs make emergency contraception uncomfortable for them.<sup>263</sup> Next, the public would be notified about a pharmacist who did not dispense emergency contraception. This could be communicated in a variety of ways: by telephone hotline,<sup>264</sup> Internet web pages,<sup>265</sup> and notices at the pharmacy. For those customers who did not know about the possibility of refusal, or did not refer to the notifications, the last measure would be to make any refusal at the counter as pleasant as possible. A pharmacist would be encouraged to explain the regulation, and how the regulation exempted the pharmacist from dispensing the medication. Next, the pharmacist would refer the customer to the nearest participating pharmacy, or at least to the hotline or Internet web page. Pharmacists would also be encouraged to share the reasoning for their reservations, only after being asked, and that any explanation would be given in a

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261. See *infra* notes 264-65.

262. See *supra* note 141 and accompanying text. Actions by the pharmacist could compound the inconvenience, especially if the pharmacist failed to "perform in a 'minimally competent' manner under any standard of care" as the pharmacist in the *Noesen* case. *Noesen v. State of Wisconsin Dep't of Regulation and Licensing, Pharmacy Examining Bd.*, 751 N.W.2d 385, 391 (Wis. Ct. App. 2008) (*Noesen* "prevented all efforts [the customer] made to obtain her medication elsewhere when he refused to complete the transfer and gave her no options for obtaining her . . . medication elsewhere."). See also, Chandrasekhar, *supra* note 7, at 55-56 (recounting story of women running out of store crying and embarrassed after being "publicly berated" by pharmacist refusing to fill prescription for emergency contraception).

263. Ms. Thelen, a pharmacist in the *Stormans* case had an arrangement with both of her employees after she had notified them of her beliefs. See *supra* notes 43 and 46 and accompanying text. In the *Menges* case, Walgreens, employer of most of the pharmacists in the case, had previously offered accommodations for the beliefs expressed by the plaintiffs. See *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006). In the *Noesen* case, one of the conditions placed on the pharmacist's license was to notify any employer of any practices he refused to perform. See *Legal battle over pharmacists' obligations is joined in Illinois*, 27 CHAIN DRUG REV. 248 (June 6, 2005). See also *Noesen v. State of Wisconsin Dep't of Regulation and Licensing, Pharmacy Examining Bd.*, 751 N.W.2d 385, 388 (Wis. Ct. App. 2008) (*Noesen* notified, by letter, the pharmacy placement service of his "conscientious objections," but failed to forward the letter to the K-Mart pharmacies where he was placed.).

264. The State of Washington had been one of the first states to raise awareness of an available hotline to locate the nearest dispenser of emergency contraception. See PATH.org, *supra* note 154 (The raised awareness increased calls to the emergency contraceptive hotline.).

265. See The Emergency Contraception Website, not-2-late.com, available at <http://ec.princeton.edu/> (last visited Jan. 10, 2009) (providing link to locate the nearest emergency contraception provider).

professional manner.<sup>266</sup> These professional responsibility goals could benefit both sides of the debate. This system would allow conscientious pharmacists to focus on all aspects of their business but emergency contraception, and would reduce the inconvenience and embarrassment of women seeking to fill prescriptions for emergency contraception.

#### IV. CONCLUSION

The debate over a pharmacist's right to conscience and a woman's right to access emergency contraception continues. This debate will probably continue as long as there is a debate over abortion and the beginning of human life. The right to access contraception has come a long way in the last fifty years,<sup>267</sup> but it appears that there are those that believe not enough progress has been made. Will a balance between the two sides ever be found? Can a compromise be made? Although there are those factions that only see black and white in the debate, any attempt to find middle ground will probably rely on the most recent jurisprudence and regulations for answers.

The current battleground exists between the claims of free exercise of religion and sex discrimination. Recently, pharmacists feeling the crunch of wide-reaching regulation have taken preemptive measures to protect their decisions relating to emergency contraception behind the counter.<sup>268</sup> Filing for injunctive relief in federal court, some pharmacists have been rewarded with temporary protection.<sup>269</sup> As more federal courts are recognizing pharmacists' claims of freedom of religion in the right of conscience context,<sup>270</sup> permanent protection appears to be within reach.

At the same time courts are recognizing freedom of religion claims in the pharmaceutical context, the federal administration has stepped in with regulation directed at added protection for health care workers that refuse to participate in abortions.<sup>271</sup> The new regulation runs parallel to

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266. Many of the publicized reports of women being turned away with prescriptions for emergency contraception include examples of pharmacists behaving in an unprofessional manner. See, e.g., Chandrasekhar, *supra* note 7, at 55-56 (claiming customer was "publicly berated" by pharmacist).

267. See *supra* note 5.

268. See, e.g., *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1248 (W.D. Wash. 2007), *stay denied*, 526 F.3d 406 (9th Cir. 2008) (filing for injunctive relief before regulation became effective).

269. *Id.* at 1266.

270. See *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1002 (C.D. Ill. 2006) ("The Plaintiffs state a claim that the Rule [forcing pharmacists to fill emergency contraceptive prescriptions] violates the First Amendment Free Exercise clause.").

271. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008).

the issue of emergency contraception, and may be broad enough to encompass pharmacists that rely on their religious or moral beliefs to inform their professional responsibilities. Since the regulation is an eleventh-hour administrative edict,<sup>272</sup> its presumed protection may be short-lived. The new administration had expressed disapproval during the rule's notice-and-comment period, and has been weighing its options ever since the President took office.<sup>273</sup>

Any remaining protections left after the new President decides whether to act in this area may be reduced to rights of freedom of exercise of religion. If the issue continues to come down to, as *Stormans* phrased it, "a pharmacy that cannot refuse and a pharmacist that cannot dispense,"<sup>274</sup> because of regulation and beliefs, respectively, then the burdens placed on the individual will be too coercive. With regulations that are too coercive, the nation may see a trend of pharmacists relocating or leaving the practice altogether. Although none can predict the effects on the practice of pharmaceuticals, there must be some concern if the practice contains only personnel that see one side of the debate, or includes those willing to abandon their deepest held convictions. Any such trend in the end may lead some to ask, "Where have all the conscientious Rx gone?"<sup>275</sup>

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272. See Stein, *supra* note 12, at A10 (reporting new administration will review the rule, which took effect one day before the new President was inaugurated).

273. See *supra* note 251 and accompanying text.

274. *Stormans*, 524 F. Supp. 2d at 1265.

275. My apologies to TED LEO & THE PHARMACISTS, *Where Have All the Rude Boys Gone?*, on HEARTS OF OAK (Lookout Records 2003).



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